United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

327

NO. 22,596

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE A
DECISION AND ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

7

JOINT APPENDIX

ARNOLD ORDMAN
General Counsel

DOMINICK L. MANOLI
Associate General Counsel

MARCEL MALLET-PREVOST
Assistant General Counsel

FRANK H. ITKIN
MICHAEL F. ROSENBLUM
Attorneys

National Labor Relations Board

PATRICIA EAMES
General Counsel,
Textile Workers Union of America
99 University Place
New York, New York 10003

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

THOMAS E. HARRIS
815 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for
Textile Workers Union of America

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TESTIMONY

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Textile Workers Union of America, AFL-CIO

Case No.: 2-CA-10823

11.4.65	Charge filed
1.31.66	Complaint & notice of hearing, dated
2.10.66	Respondent's answer received
3.22.66	Respondent's demand for bill of particulars, received
3.23.66	Respondent's letter request postponement of hearing, dated
3.29.66	General Counsel's opposition to motion and bill of particulars, dated
3.30.66	Order rescheduling hearing, dated
3.31.66	General Counsel's letter advising that General Counsel will move to amend complaint, dated
4.8.66	Trial Examiner's denying Respondent's motion for bill of particulars, dated
4.25. 66	Respondent's teletype requesting postponement of hearing, dated
4.27.66	Order rescheduling hearing, dated
4.28.66	Petitioner's[1/] motion for reconsideration, dated
5.9.66	Amended complaint and notice of hearing, dated
5.19.66	Respondent's answer to amended complaint and request for bill of particulars, received
5.20.66	General Counsel's opposition to motion for bill of particulars, dated
5.31.66	Trial Examiner's order denying Respondent's request for bill of particulars, dated

1/ Petitioner herein, was Charging Party before the Board.

6.7.66	Hearing opened
7.1.66	Hearing closed
9.22.66	Trial Examiner's Decision issued
11.28.66	Respondent's exceptions received
12.7.66	General Counsel's answering brief to Respondent's exceptions, received
10.21.68	Decision and Order issued by the National Labor Relations Board, dated
10.25.68	Petitioner's 1/ motion for reconsideration and request for oral argument, dated
12.18.68	Board's Order denying motion for reconsideration and request for oral argument, dated

1/ Supra.

D-9521
Port Jervis, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARTHUR F. DERSE, SR., PRESIDENT, AND
WILDER MFG. CO., INC.

and

Case 2-CA-10823

TEXTILE WORKERS UNION
OF AMERICA, AFL-CIO

DECISION AND ORDER

On September 22, 1966, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent Company had not engaged in certain other alleged unfair labor practices, and dismissed the complaint as to these allegations. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in support of the Trial Examiner's Decision and an answering brief to Respondent's exceptions and brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the briefs, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herein.

As the Trial Examiner found, on the morning of October 12, 1965, Union representatives Cohen and Hissam met with Walter Derse, secretary and general manager of Respondent Company, claiming to represent a majority of its production and maintenance employees and made a demand that the Company recognize the Union as the bargaining agent of these employees. The three men went into Derse's office whereupon Cohen repeated the demand for recognition and thrust 11 signed authorization cards in front of Derse. Derse replied that the Company was a corporation and he had no authority to answer the demand.

1/ Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Cohen continued to press for an answer and Derse replied that the officers of Respondent Company [2] would meet the next night and that the Union would have an answer on the day following.

The testimony is disputed as to whether or not Derse examined the cards. Derse testified that he did not pick up the cards, but that he shoved them aside and saw some signed cards and some blank cards.[3] Cohen testified that Derse went through the cards and was scrutinizing them throughout the conversation. Hissam testified that Derse picked up the cards and went through them one by one. Based on credibility resolutions, the Trial Examiner found that Derse did examine the cards. We find no reason to overturn the Trial Examiner's finding on this point.

Shortly after the conversation that same morning, the 11 employees who had signed cards stopped work and set up a picket line.[4] For approximately 8 months at least some of the employees continued to picket Respondent's plant.

On October 13, the officers of Respondent Company held a meeting and came to a decision that the Union did not represent a majority of its employees based on Derse's statement to his fellow officers that the Union had 10 or 11 cards and Respondent had 30 employees.[5] They then decided to retain labor counsel. On October 25, Union representative Rubenstein asked Derse if he had made a decision. Derse replied he had no comment to make and handed the representative a slip of paper with the name of the labor

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2/ Derse's two brothers and his father own all the stock of Respondent Company and are its officers.

3/ Cohen testified that two blank cards were included because two employees indicated that they were going to sign, but the Union hadn't as yet obtained their signatures.

4/ Two more employees signed authorization cards and joined the picket line the next day.

5/ The Trial Examiner found that the appropriate unit consisted of 18 employees and that on October 12 Respondent Company knew that the Union represented an uncoerced majority of its employees in a unit appropriate for the purposes of collective bargaining by reason of Derse's examination of the union authorization cards and because the officers of Respondent Company observed and knew that a majority of its employees in such a unit had ceased work and were on a peaceful picket line patrolling the Company's premises.

counsel on it. Rubenstein contacted the Respondent's attorney on October 27, and was told that the attorney had received no instructions from his client. The Union subsequently renewed its bargaining requests, but heard nothing further from Respondent.

The Trial Examiner found that the Union's majority status was proved when the Union, on October 12, presented Respondent with signed authorization cards from a majority of the employees in the unit and those employees struck and commenced picketing upon Derse's failure to grant the Union's initial demand. In the circumstances, the Trial Examiner further found that Respondent could not have had a good-faith doubt of the Union's majority status and, therefore, that it violated Section 8(a)(5) of the Act by its failure to recognize the Union. We do not agree.

The Board has made clear that to establish that an employer's failure or refusal to grant recognition to a union on the basis of a card showing violates Section 8(a)(5), the General Counsel has the burden of proving not only that a majority of employees in the appropriate unit designated the Union as their bargaining representative, but also that the Employer in bad faith declined to recognize and bargain with the Union. This is usually based on evidence indicating that the Employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the Union and dissipate its majority. 6/

In the present case, however, there is no showing whatsoever that Respondent had rejected the collective-bargaining principle or engaged in any interference, restraint, or coercion of employees to undermine the Union. Nor does the record show that Respondent has engaged in any other conduct which would prevent the holding of a fair election. We conclude, therefore, that the record does not preponderantly establish Respondent's bad faith in refusing to recognize the Union, and we shall dismiss the complaint.

6/ Joy Silk Mills, Inc., 85 NLRB 1263, enfd. 185 F.2d 732 (C.A.D.C.), Compare, however, Snow & Sons, 134 NLRB 709 enfd. 308 F.2d 687 (C.A.9).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

TXD-560-66
Port Jervis, N. Y.

UNITED STATES OF AMERIGA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

ARTHUR F. DERSE, SR., PRESIDENT AND
WILDER MFG. CO., INC.

and

Case No. 2-CA-10823

TEXTILE WORKERS UNION
OF AMERICA, AFL-CIO

Raymond Green, Esq. and Winfred D. Morio, Esq., of New York, N.Y., for the General Counsel.
Joseph S. Rosenthal, Esq., of New York, N.Y., for the Respondent.
Jack Rubenstein, of New York, N.Y., Sy Cohen, of Hudson, N.Y. and William Hissam, of Matamoras, Penn., for the Textile Workers Union of America, AFL-CIO.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge 1/ filed by the Textile Workers Union of America, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board by the Regional Director for the Second Region on May 9, 1966, issued an amended complaint and notice of hearing naming as the Respondents, Arthur F. Derse, Sr., 2/ President, and Wilder Mfg. Co., Inc., herein referred to sometimes as the Respondent Company or Respondent employer. The amended complaint alleged that the Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, herein called the Act. The Respondent denied the allegations of the amended complaint by answer timely filed.

The foregoing case came on to be heard before the undersigned Trial Examiner, Lowell Goerlich, on June 7, 8, 9, 29, 30 and July 1, 1966, at Port Jervis, New York. At the hearing each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally upon the record, to submit proposed findings of fact and conclusions of law and to file briefs. All briefs have been reviewed and considered by the Trial Examiner.

The principal question before the Trial Examiner is whether the employer was obligated to recognize and bargain with the Union upon a showing that an uncoerced majority of its employees in an appropriate unit had designated the Union as their bargaining agent.

1/ The charge was filed on November 4, 1965.
2/ Arthur F. Derse, Sr. owns a majority of the stock of the Wilder Mfg. Co., Inc. His three sons, Arthur F. Derse, Jr., Robert Derse and Walter Derse own the remaining shares.

Upon the whole record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact and Conclusions

I. The business of the Respondent

The Respondent Company is and has been at all times material herein a corporation duly organized, and existing by virtue of the laws of the State of New York, and at all times material herein the Respondent Company has maintained an office and place of business at Mechanic Street and Erie Railroad, in the City of Port Jervis, New York, where it is and has been at all times material herein engaged in the manufacture, sale and distribution of baking pans, bakeshop equipment and related products.

During the past year, which is representative of its annual operations generally, the Respondent Company, in the course and conduct of its business, purchased and caused to be transported and delivered to its Port Jervis plant, steel and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its plant in interstate commerce directly from States of the United States other than the State in which it is located.

The Trial Examiner finds, as is admitted, that the Respondent Company is now and has been at all times material herein engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein. 3/

II. The labor organization involved

Textile Workers Union of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. The alleged violations of Section 8(a)(1) of the Act

The sole admissible evidence cited by the General Counsel in support of the contention that the Respondent Company violated Section 8(a)(1) of the Act is the following testimony of employees Jack Munoz and Charles Shaw. From the testimony of Jack Munoz:

> ". . . Walt said to tell us that any time we wanted to go back we could come back and send a committee of two men to go talk to Walt." 4/

From the testimony of Charles Shaw:

> "Well I went down to get a couple of tires for my car from the locker room and we got on talking about the plant and he said there were some changes made that they had coffee breaks now that we didn't have before, and that the merit system was tarowed out and that they were getting paid overtime for Saturdays . . . ." 5/

Both statements were attributed to Supervisor William DeGraw.

3/ The Trial Examiner deems it unnecessary for the purposes of this decision to resolve whether Arthur Derse, Sr., is an employer within the meaning of the Act.

4/ The General Counsel contends that this statement "constitutes an attempt to by-pass the employees' representative."

5/ The General Counsel contends that this statement "amounts to an attempt to induce Shaw and the other strikers to cease picketing by an offer of benefits."

A strike occurred at the Company's establishment on October 12, 1965. Picketing continued for about 5 or 6 months thereafter.

DeGraw testified that about 2 weeks after the strike commenced, as he was on his way with his family to pick apples at his father-in-law's place, he saw Munoz' automobile parked at his home; he stopped to visit with him. While there, the DeGraws picked apples, discussed deer hunting and football and watched a part of a football telecast. During the course of the visit DeGraw asked Munoz "if he were going back to work" Munoz answered, "No, not without a union."

Munoz' testimony varied little from that of DeGraw except Munoz attributed to DeGraw the remarks set out above, to wit:

> ". . . Walt said tell us that any time we wanted to go back we could come back and send a committee of two men to go to talk to Walt."

DeGraw specifically denied that he had made these remarks. Munoz agreed that he and DeGraw were friendly and visited at each other's homes. The visit lasted between 20 minutes and a half hour.

Employee Charles Lincoln Shaw, prior to the strike, had purchased an automobile from Supervisor DeGraw. Some time during March 1966 Shaw visited DeGraw for the purpose of picking up a "couple of tires" which belonged to the automobile. According to Shaw, he asked DeGraw whether it would be alright if he returned to work. DeGraw responded that he did not believe that Shaw would be fired and he could return to work if he "wanted to." According to DeGraw Shaw asked him whether "there was any chance of his coming back to work." DeGraw answered that "any one of the striking employees could come back to work, that the door was opened." Shaw responded, "Fine, probably be back on Monday." DeGraw testified that Shaw also asked him if any changes had been made at the plant. DeGraw also testified that the parties had discussed overtime work.

Credible testimony indicated that the only change effected during the strike period was the establishment of a break time. Prior to the establishment of such break time employees were permitted to obtain a cup of coffee at any time during the workday and if they wanted to smoke "they would go to the mens room." As early as September 1964, DeGraw had recommended established breaks in lieu of this practice; however, established breaks could not be put into effect because the Respondent Company did not have a smoking permit from the State Department of Labor. Application was made for such a permit on Ocotber 12, 1964. The permit was granted after an appeal on July 1, 1965 upon condition that "/s/moking shall be permitted during the coffee break and lunch period." In accommodating the condition the Company was required to make certain alterations in its plant to provide an approved smoking area for its employees. These alterations were commenced in the latter part of 1965 and completed in the early part of 1966. Two 10 minute coffee breaks, one in the morning and the other in the afternoon, were then established.

The record is barren of any credible evidence that the "merit system was throwed out" or that there was any change in pay for Saturday overtime. Thus the record is lacking in proof that the employer did attempt to induce strikers to cease picketing by an offer of benefits and hence it is highly unlikely that DeGraw would have made the representations which were attributed to him by Shaw. Moreover, as between DeGraw and Munoz and Shaw the Trial Examiner credits DeGraw. In reaching this conclusion the Trial Examiner has considered the nature of the testimony, the demeanor of the witnesses, the environment in which DeGraw's remarks were uttered, and the fact that the employer's policy was clearly one of avoiding the commission of any unfair labor practices. Measured by the

allowable rights granted under Section 8(c) of the Act, the Trial Examiner cannot find that by De Graw's conduct, as detailed in the Record 6/ the Respondents violated Section 8(a)(1) of the Act. Dismissal of all allegations of the amended complaint based upon the alleged misconduct of Supervisor De Graw is recommended.

B. The alleged violation of Section 8(a)(5) of the Act

(1) The Union's showing of interest

William Hissam, a representative of the Union, met with 11 employees of the Respondent Company at his home on the evening of October 11, 1965. Present were Dominick Caliciotti, James Ehre, Fredrick J. Hicks, Harman B. Masker, Michael J. Molloy, Jack Munoz, Joseph Munoz, Arthur I. O'Hara, Charles L. Shaw, James E. Stempert and Harold D. Vandermark. At the meeting each of the 11 employees signed a union authorization card 7/ and approved a motion by signing his name below the following language: "Upon asking employer for recognition, and upon his refusal there is a motion among the people present to go on strike."

On October 12, 1965 these 11 cards were presented to Walter Derse, secretary and general manager 8/ of the Respondent Company, who thereupon did not recognize the Union as the statutory bargaining agent of its employees. Upon being so advised the 11 employees, who had reported for work on the morning of October 12, 1965, left their jobs and set up a peaceful picket line in the vicinity of the Respondent Company's premises.

The Trial Examiner finds that on October 11, 1965, 11 employees of the Respondent Company had designated and selected the Union as their bargaining agent.

On October 12, 1965 H. Hernsdorf of his own free will signed a union authorization card 9/ in response to a request by a picket as he left the employer's plant at noon. Hernsdorf joined the picket line and picketed on October 12 and the following day. He remained away from work for several months thereafter.

On October 12, 1965 Irving Hughson signed a union authorization card "/b/y the picket line." Thereafter Hughson remained away from work until January 20, 1966.

6/ The Trial Examiner has considered all evidence in the Record involving DeGraw.

7/ The card contained the following language: "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." Signatures on the cards were properly authenticated for the record either by the acknowledgment of the signers under oath or by the credible testimony of a witness who observed the signing of the card.

8/ As general manager, Derse testified that he was responsible for "the entire operation, the sales, the advertising, production and all problems relating to anything of this nature."

9/ There is no competent credible proof that Hernsdorf was coerced into signing the card on October 12, 1965.

The Trial Examiner finds that by the afternoon of October 12, 1965 13 of the Respondent Company's employees had designated and selected the Union as their bargaining agent.

(2) The appropriate unit

The amended complaint alleges that the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> "All production and maintenance employees of Respondents, employed at its Port Jervis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act."

The parties stipulated that there were 30 employees on the Respondent Company's payroll as of October 12, 1965 "with the exception of the executive officers." 10/ By consent of all parties the following 18 employees appearing on the October 12th payroll were included in a unit of production and maintenance employees: Roger Burcham, Dominick Caliciotti, James Ehre, Frank Griggin, Hilmut Hernsdorf, Fred Hicks, Irving Hughson, Harmon Masker, Michael Malloy, Jack Munoz, Joseph Munoz, Arthur O'Hara, Don Shafer, Charles Shaw, Allen Smith, James Stempert, Frank Tonkinson and Harold Vandermark. The parties further agreed that Jack McCaslin, 11/ plant manager, and William DeGraw, 12/ supervisor of the machine department, should be excluded as supervisors and that Jean Clark, Shirley Hawkins, and Patricia Somarelli should be excluded as office clerical employees. The Respondent Company contends that the seven employees remaining on the payroll list of October 12, 1965 should be included in the appropriate unit. 13/ The General Counsel maintains that the seven employees 14/ should be excluded from the appropriate unit.

The Respondent Company's plant is located at Mechanic Street and Erie Railroad, Port Jervis, New York. 15/ A brick wall separates the factory or production section of the plant from the general office area. The factory

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10/ The executive officers of the Respondent Company were Arthur F. Derse, Senior, president, Walter Derse, Secretary, Arthur Derse, Jr., vice president, and Robert Derse, treasurer.

11/ Of McCaslin's duties Walter Derse testified, "Jack McCaslin is in charge of the production department. He handles the assembly and he is over Bill DeGraw. . . He is responsible to me and only me."

12/ Of DeGraw's duties Walter Derse testified, "Mr. DeGraw is the foreman in the machinery department, and takes over in Jack McCaslin's absence, of the entire production."

13/ Since the Respondents' proposed unit is composed of 25 employees it is apparent that the Union on October 12, 1965 held valid authorization cards (13 in number) for a majority of the employees in such unit.

14/ These employees were Chester Swingle, Harold Louer, Earl Clark, James Wharton, Francis May, Carol Forbes, and Yvonne Flannery.

15/ Walter Derse described the Respondent Company's business as follows:

> "We manufacture steel baking equipment. We start with raw material that is in the form of sheets, angle iron. Such finished hardware as casters, bolts, et cetera.
>
> This material is sheared and blanked, punch formed, and then assembled in various ways, either spot welding or electric welding, Healy arc welding, Baum riveting.
>
> Some items go out unassembled. They get shear knocked down, and the ultimate form of this equipment is in work benches for bakeries and ingredients containers (Continued)

area or section contains a machine shop, welding department, assembly area, machinery area, packing area, receiving area and raw storage, and warehouse and shipping area. The shipping area, warehouse and receiving area and raw storage are separated from the remainder of the factory section by a wall. An enclosed production office is located in the assembly area where McCaslin is located. No clerical type employees are assigned to the production office. The general office contains partitioned spaces, ceiling high for the president's office, treasurer's office, secretary's office, vice president's office, accounting department and layout department. Bounded on one side by the wall separating the factory section from the general office and by the president's office, accounting department, lobby, treasurer's office, secretary's office, vice president's office and layout department is an area designated as the corridor and file room. Each of the above-mentioned offices and departments has doors opening into this area.

Of the seven employees whose classifications are in dispute six are assigned to the general office area. Swingle works in the factory area. The three excluded office clericals are also assigned to the general office area. Employees Lauer, Wharton and Clark worked in the layout department; May's desk was located in the corridor and file room adjacent to the layout department. Clark's desk was located in the corridor and file room next to the secretary's office door. Hawkins' desk was adjacent to and in front of Clark's desk. Flannery and Forbes were located at the end of the corridor and file room nearest the president's office and accounting department. Sommarelli worked in the accounting department.

The corridor and file room contained file cabinets, desks, chairs, adding machines, typewriters, a calculating machine, a Zerox machine, and a storage cabinet. Partitions in this area were 54 inches high.

The general office and factory areas have separate entrances. Employees working in the general office area normally use an office entrance while employees working in the factory area use the factory entrance which opens onto a parking lot. Separate timeclocks are maintained for each group of employees. Employees working in the factory area wear a different kind of apparel than those assigned to the office area. Office and factory employees do not work like hours. 16/ Jack McCaslin, plant manager, who is the senior supervisor over the employees who work in the factory area, exercises no supervisory authority over the employees who are assigned to the general office area. Employees are not interchanged between the factory area and the office area. Employees in the office area recieve their instructions principally from Walter Derse, Robert Derse and Arthur Derse, Jr.

The duties of Harold Lauer, Earl Clark and James Wharton. Lauer, Clark and Wharton work in the layout department which was also referred to by Lauer as the engineering and estimating department. Lauer testified that he was "/h/ead of the engineering and estimating department."17/

15/ (Continued)
> and ingredients drawing units, flour, sugar and items of this nature, pan racks for the storage of pans and bake goods, dolleys for pans and bulk racks, cabinets for the raising of doughs and items of that nature.
>
> They are basically used in various types of retail or small type bakery operations or bakery departments. . . ."

16/ Derse testified that the production and maintenance employees punch in at 8 a.m. and out at 4:45 p.m. and have 45 minutes for lunch; that the girls in the office punch in at 8:30 a.m. and out at 5 p.m. and apparently have an hour for lunch; that Lauer, Wharton and Earl Clark punch in at 8 a.m. and out at 5 p.m. with an hour for lunch, and that May punched in at 8 a.m., out at 5 p.m. with an hour for lunch.

17/ Lauer testified, "I have two men that work directly under me, Earl Clark and Jim Wharton."

Walter Derse testified that while the department is under his "command" he looks to Lauer "to see that the other men /take/ care of the job." Lauer 18/ described his duties as follows, "any requisitions 19/ that I receive from the sales department have to be processed under my direction. Sometimes I do the work of processing these requisitions, most of it is carried out under my direction by Wharton and Clark. This would mean laying out 20/ the jobs, preparing any necessary drawings. I also have to follow through any item, catalogue item, that is under redesign or is of new design, also any prices of special items, noncatalogue items or special items. I figure the prices on them and also the perpetual pricing system that is set up for all catalogue items is under my direction." Lauer also testified that he spent his time "/d/elegating the work to be done, 21/ checking out what work has been done, checking into new design provisions, work of that type." Lauer also said he worked "on planning into designs and designing into equipment."

Lauer is an associate engineer, a graduate of Pennsylvania State University.

Lauer testified that he normally performed his duties in the "engineering office" and did not work in the factory areas; however, upon occasion he went into the plant. Occasionally one of the Derses summoned him to the plant to show him "something that should be changed on an item or a problem that /had/ arisen." Sometimes he was called into the plant by McCaslin or DeGraw about a problem. These problems were described by Lauer as "/u/sually a production problem or an item being made. Could be they have to substitute material, sometimes we run short of material, there could be a mistake in the engineering layout, there could be a mistake in the drawing, something of that type." Chester Swingle, who was in charge of the warehouse, receiving, packing and parts department, consulted Lauer about packing and bill of parts problems. Lauer's visits to the plant were brief and intermittent; he noted the problem on a pad and resolved it in the layout department if it could not be "taken care of immediately." The record is barren of any evidence that Lauer in the course of his duties contacted non-supervisory factory personnel.

Lauer testified that Wharton and Clark work in the engineering office and each has "their own drafting board with a drafting machine attached to the board, they have architects and engineers scales, mechanical drawing pencils, mechanical sharpeners and any necessary drafting instruments." Lauer said that they were not "full-time draftsmen" 22/ but only performed drafting

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18/ Lauer's testimony is credited in connection with the functions and duties of the employees in the layout department.

19/ A requisition is a form made up by Frank May when items required to fill a customer's order are either not in stock or when by filling the order, the number of such items in stock will fall below a minimum figure.

20/ Lauer described "layouts" as "necessary papers for men in the factory to produce catalog items or special items" and entailed "any cutting sheets, shearing sheets, fill in cards, wood working sheets, any necessary drawings, mechanical drawings, made in proportion." According to Lauer he reviewed this kind of work and assigned it to Wharton or Clark. When it was completed it was returned to his desk for checking.

21/ Lauer testified "I assign their work, what has to be done, I tell them /Clark and Wharton/ what to do first, and if there's any question arises while they're doing it, I try to answer that."

22/ Lauer defined a draftsman as "either a man or woman having the knowledge to use a drafting machine, engineer scales and be able to draw architectural or mechanical scales."

work when the work required drafting to be performed. Besides draftsmen's work, Lauer said that Wharton and Clark "do lay out, filling in the sheets, items to be made." Clark in addition to job layouts and drafting "takes method photos" and "catalog photos." Both Clark and Wharton use drafting machines, scales, dividers, and compasses in the normal performance of their duties which are performed at their "own drawing boards" in the "engineering office."

According to Lauer Clark had no technical schooling in drafting; his knowledge of drawing and drafting had been acquired through experience. Wharton had mechanical drawing in school and attended Orange County Community College where he took a course in drafting.

While Clark normally performed his work in the engineering department at least once a month he went to "the factory to take any photographs of a particular method or way a job is done" for engineering recording. On these occasions he might spend 20 minutes to a half hour in the plant. Clark also had occasion to carry papers in reference to a "quickie job" to the production department. These trips consumed a "few minutes." Wharton also delivered papers to the production department for jobs which were not run through a regular shop order. As did Clark's trips, these trips consumed a few minutes.

The duties of Frank May. Frank May was designated as an inventory control clerk and maintained the inventory control file. May is responsible to Walter Derse.

As orders were received, Jean Clark, an excluded clerical employee, placed them in an order pan where they were picked up by May who interpreted them and checked them with the catalogue to make sure that the order was correct. May then made up a return makeup order sheet, checked the inventory to make certain the items ordered were available by consulting a master inventory list by his desk, and reserved the inventory. If there were insufficient items in stock to cover the order or if the order brought the amount of stock below the minimum or if it was an item made up on order only, May made out a requisition in longhand which he delivered to the layout department for Lauer's review. The requisition was then typed by Flannery.

When the items were in stock, the order was typed from the makeup order. May then checked the typed copy with the makeup order and if it was correct he removed the shipping order copy. Shirley Hawkins, an excluded clerical employee, typed labels and bills of lading which she delivered to the shipping department together with the shipping order copy.

May occupied a desk adjacent to the layout department opposite the vice president's office. No partition surrounds his station. According to Derse, May spent 75 percent of his time at his station and the remainder in the plant; however, other testimony which seems more plausible indicates that May spent 5 or 10 minutes a day in the plant. There is no evidence that May worked in the factory. May's only activities in the factory described in the record concern his traveling to the shipping area to pick up the shipping department's copy of the orders together with the first and third copy of the bill of lading which he brought to his station. 23/

23/ Derse testified, "They /May and McCaslin/ discuss . . . what may be coming through the plants, and Frank will then, based upon this conversation with Jack, he will make his moves, so his moves in many cases are dependent upon what Jack McCaslin tells him."

The duties of Carol Forbes. According to Walter Derse Carol Forbes was responsible to him although Lauer "makes sure she carries out the proper distribution of the forms and makes sure that the operational cards and any papers relevant to the production are carried out in the right form." Forbes received envelopes containing orders and layout forms from the layout department. She then prepared the operational timecards required for each order and added them to the documents already in the production envelope. Forbes also was required from time to time to run the Ozalid machine located in the layout department in order to duplicate operational timecards. Forbes spent approximately 70 percent of her time preparing the operational timecards. She also prepared method sheets which she received from the layout department. These method sheets are taken by her to the production office where they were stored.

The duties of Yvonne Flannery. Yvonne Flannery was an inventory clerk for raw materials. She was responsible to Walter Derse. She also typed shop orders. In performing the function of inventory clerk for raw materials she entered shipments received and maintained a master file of raw materials. On occasion she would consult with Plant Manager McCaslin about material, particularly if there was a question concerning the type of material which had been received.

The duties of Jean Clark, Shirley Hawkins and Patricia Somarelli. 24/ Jean Clark. Jean Clark who had been employed by the Respondent Company for a period of 11 years was a clerk-typist. She was the confidential secretary to Walter Derse. In the morning and afternoon she opened the mail and distributed it. She also wrote up sales orders and checked sales orders written by employee Hawkins. She handled all correspondence. Once a day for 5 or 10 minutes she delivered shipping papers to the shipping and receiving department. Shirley Hawkins. Shirley Hawkins worked in the sales department in the general office area. She wrote the main part of the sales order, figured the pricing, handled some correspondence and typed envelopes. On occasion she would take shipping papers to the shipping and receiving department. Patricia Somarelli. Patricia Somarelli worked in the accounting department. According to Derse she spent the first hour and a half of every day in the production office checking operation and payroll cards which were delivered to Carol Forbes for recording the operation time. At the end of the week Somarelli prepared the payroll from the timecards. Somarelli also prepared accounts payable and receivable, prepared bank deposits and wrote checks.

The duties of Chester Swingle. According to the testimony of Walter Derse, Swingle was "in charge of the warehouse, receiving, packing and parts department." Swingle "told /employees James Stempert and Arthur O'Hara/ what to do" 25/ and was "basically" in charge of their activities.

Derse testified that he "looked on /Swingle/ as a supervisor." Swingle and Plant Manager McCaslin were "responsible for checking final production." Swingle "on occasion" answered to Walter Derse; on other occasions he answered to McCaslin. Swingle received a higher rate of pay than the employees, Stempert and O'Hara. Swingle worked alone about half of the time. When Stempert and O'Hara worked with him, Swingle also physically worked at packing and shipping. Stempert and O'Hara reported to Swingle each day. If Swingle had no work for them he turned them over to McCaslin.

24/ The duties of the excluded clerical employees are reviewed in order that the unit question may be viewed in full perspective.

25/ Derse testified "If he /Swingle/ wanted them to pack they packed, if wanted them to cut up a little they cut up a little."

The Trial Examiner is of the opinion that Swingle responsibly directs employees of the Respondent Company and that the exercise of such authority was not of a merely routine or clerical nature but required the use of independent judgment. The Trial Examiner finds that Swingle is a supervisor within the meaning of Section 2(11) of the Act. The Trial Examiner is of the same opinion in respect to Harold Lauer and finds that Lauer is a supervisor within the meaning of Section 2(11) of the Act. Thus Swingle and Lauer must be excluded from any unit.

As to the other five employees whom the Respondent would include and the General Counsel exclude from the appropriate unit, it is the opinion of the Trial Examiner that they should be excluded from the appropriate unit in that a community of interest is lacking between these five employees and the conceded production and maintenance employees. Of controling importance in reaching this conclusion are these factors: (1) no working contacts exist between the five employees and the production and maintenance employees, (2) common supervision is lacking, (3) working conditions are dissimilar, (4) skills and functions of the two groups of employees differ, (5) substantially all the work of the five employees is performed in the general office area in close proximity with excluded office employees and the administrative officers of the Respondent Company, (6) the five employees are under the same general supervision as the excluded clerical employees, (7) the five employees perform work closely related to that of employees usually excluded from production and maintenance units, (8) the work of the five employees is not directly integrated with the production process, and (9) a community of interest prevails between the five employees and the excluded clerical employees.

The Trial Examiner finds that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> "All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act." 26/

(3) The Union's demand for recognition and the Respondent's refusal to recognize the Union

Between 9:30 and 10 o'clock on the morning of Ocotber 12, 1965 Cy Cohen 27/ and William Hissam, representatives of the Union, made demand upon Walter Derse that the Respondent Company recognize the Union as bargaining agent. According to Derse he arrived at the Company's plant at about "25 minutes to 10:00" and was advised that a Mr. Cohen wanted to see him but would not state his business. About 5 minutes later Cohen appeared in the lobby but again would not state his business. Upon receiving this information from Yvonne Flannery, Derse went to the lobby. Cohen introduced himself and Hissam and said, "We're from the Textile Workers Union. We have something of material interest." Derse said "What do you mean." Cohen replied, "We represent a majority of your employees, 28/ and we want to know

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26/ The Trial Examiner considers this unit to be substantially the same as the unit set forth in the amended complaint.

27/ Cy Cohen had been employed by the Union for "/t/wenty odd years."

28/ Derse denied that the term "production and maintenance employees" had been used. Both Cohen and Hissam testified that Cohen informed Derse that the Union represented a majority of "production and maintenance employees." The Trial Examiner credits the testimony of Hissam and Cohen in this respect as well as the other material portions of their testimony which is in conflict with that of Derse. These credibility resolutions are not only drawn from the demeanor of the witnesses, but it seems plausible that a union representative such as Cohen with "20 odd years" experience would not have overlooked demanding recognition in a "production and maintenance unit."

whether you will recognize us as their bargaining agent." Whereupon Derse invited Cohen and Hissam into his office where all three sat at a small conference table, "two and a half feet by four." Cohen "shoved" the authorization cards in front of Derse but Derse did not touch them. Cohen repeated the purpose of his visit and Derse replied, "Mr. Cohen, this is a corporation, and I have absolutely no authority to answer that question." Cohen inquired, "In other words, you refuse?" Derse answered, "I didn't refuse. I said I did not have authority to answer that question." Cohen responded, ". . . if you refuse, we'll file unfair labor practice charges." Derse said, "There's nothing I can do about it. I have no authority." Cohen continued to press for an answer and Derse said that he "could have an answer on Thursday" 29/ at which time his one brother (Arthur Derse) would have returned from Atlantic City. Derse indicated that the officers of the Respondent Company would meet on Wednesday night. Cohen said, "I can't wait that long . . . I have to know. I will give you an hour. Would you rather have the men wait outside." 30/ Derse replied, "I can't do anything about it, I can not answer the question you ask me." Cohen again "shoved" the cards toward Derse who did not pick them up. Derse testified that he "moved them aside" and saw some signed cards and some blank cards. Cohen said, "Yes, there are blanks in there." 31/ At this point Cohen asked if he could "talk to the men outside." Derse replied that he had no authority "to let /him/ inside to talk to these men." Cohen then asked whether he could place a phone call to the men. Derse explained that emergency calls were permitted. Thereupon Derse "took the cards" and "shoved them back." Cohen picked up the cards 32/ and left. It was then about 10:10 o'clock.

At 10:25 o'clock a phone call was placed through the plant switchboard to Jack Munoz. At 10:26 o'clock the 11 employees who had signed cards punched out and left the plant. At 10:26 o'clock Cohen phoned Walter Derse and according to Derse said that "their boss (Mr. Rubenstein) said they could not wait, that they were going to pull them men out." Derse replied, "Nothing I could do about it."

Derse testified that by late night of October 12, 1965 he had contacted all the officers of the Respondent Company including Arthur Derse, Jr. who had been in Atlantic City and suggested that they get together on Wednesday night, October 13, 1965.

On October 13th at 11:25 a.m. Derse received a telephone call from Cohen. According to Derse, Cohen asked him if he had made up his mind. Derse answered, "No, my brother had not as yet returned, that I couldn't talk to him, 33/ that we would get together that night and I could only answer him the next night. That was the earliest I could tell him." Cohen wanted Derse again to "agree to recognition." Derse answered that he "couldn't do it until a decision was made." 34/

29/ Derse's affidavit to the Board does not reveal that Derse had told Cohen that he would have an answer by Thursday. In any event the Union received no answer.

30/ In his affidavit to the Board Derse averred, "Cohen said he could not wait until the next day for answer, he could wait an hour or otherwise he would pull the men out on strike."

31/ Cohen testified that he laid the cards on the table in front of Derse. Derse picked them up and "went through them." Derse noticed two blank cards and "questioned" them. Cohen told him that the cards were "in there because two people . . . signified they were going to sign" and the Union "hadn't been able to get their signatures as yet." Cohen testified that Derse was "scrutinizing" the cards "all during the conversation and that" he put them down once and picked them up again."

32/ Derse testified that he "would judge that there was, including the blanks, probably fifteen cards," but that he did not know how many blankds were among them.

33/ Derse admitted that this statement to Cohen was untrue.

34/ Derse denied that Cohen mentioned that he held two additional authorization cards. Cohen testified that he called Derse on (Continued)

The meeting of the Respondent Company's officers was held on Wednesday night. According to Derse the officers came to a decision that they doubted the majority based upon Walter Derse's statement, "It looks to me like about ten or eleven, and we're thirty-four people. Dropping us four as officers we still have thirty. Now, simple mathmatics, eleven is not a majority of thirty . . ." 35/ The officers decided to retain counsel, a labor specialist. 36/ Derse contacted and retained Friedlander, Gaines and Ruttenberg on October 19, 1965.

On October 25, 1965 Derse testified that as he was driving in the Company's parking lot Jack Rubenstein, a union representative, asked him whether he had made a decision. Derse answered, "I have no comment to make" and handed him a slip of paper with the names and phone number of Friedlander, Gaines and Ruttenberg. Rubenstein was told to contact these attorneys. 37/

Between October 13th and October 25th the Respondent Company did not contact the Union or thereafter. The matter has remained in the same status in respect to union recognition as it was on October 12, 1965. Throughout the strike the employer maintained an open door policy toward the strikers. The Company remained out of production for about 30 days. On December 30, 1965 the employer wrote a letter to the striking employees in which the employees were reminded "that the door has always been open for your return." The letter highlighted the "past performance of the company" in contrast with the "unfilled promises you have received from outsiders or strangers." The employer commenced hiring new employees on January 3, 1966 Seven employees have returned to work. 38/ One employee refused to come back because he wanted more money. On January 4, 1966 the employer wrote the

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34/ (Continued) October 13, 1965 and asked him if he had heard anything from his brothers. Derse answered, "No." According to Cohen, he told Derse, "As a matter of form I am asking you for recognition once more. I have additional cards I expected yesterday, I have them to-day." Cohen requested an answer as "quickly as possible" and suggested that he call Derse later. Derse replied, "If you want to call, call, if you don't, don't."

35/ Derse testified that he included all the employees in the thirty "because . . . what Mr. Cohen told me, was that they represented a majority of our employees." As noted above the Trial Examiner has found that the Union requested representation in a production and maintenance unit. Thus there was no basis for Derse's assertion that the Union desired to represent all thirty employees. Moreover, the Trial Examiner is not convinced that Derse was so unschooled in labor matters as to believe that the Union was seeking to represent Plant Manager McCaslin, Supervisor DeGraw, or the office clerical employees whom the employer conceded should be excluded from an appropriate unit. Furthermore at the time Derse's remarks were claimed to have been made, he was aware that only production and maintenance employees had joined the strike.

36/ Derse had contacted a local attorney on October 12th who told him he should make no further comment or do anything about the situation but to seek a competent attorney.

37/ Rubenstein testified without contradiction that he contacted the Respondent Company's attorneys on October 27, 1965 and was told that the attorneys had received no instructions from their client. Rubenstein heard nothing further from the attorneys.

38/ Frank Tonkinson (Frank Tonkinson remained away from work several weeks after the strike commenced) and Irving Hughson returned in January 1966. Charles Shaw followed in the latter part of March or early April. Stempert, Ehre and Hicks returned in the later part of May, 1966. Vandermark returned in June, 1966. Hernsdorf returned for a day and a half in January 1966.

striking employees again reminding them that the "door is open to you" and that "you have not had to pay dues and initiation fees to get and keep your job at Wilder." The letter was closed with the statement "There is no need to loose further wages while waiting for a satisfactory settlement of the present problem." The picket line remained for about 5 months within full view of persons passing in and out of the Company's establishment. 39/

Upon the basis of the foregoing testimony and in line with the Trial Examiner's credibility resolutions, the Trial Examiner finds that on October 12, 1965 the Union presented to the Respondent Company a claim to be recognized as the representative defined in Section 9(a) of the Act and that on such date and thereafter the Respondent Company knew that the Union represented an uncoerced majority 40/ of its employees in a unit appropriate 41/ for the purposes of collective bargaining by reason of Walter Derse's examination of the union authorization cards, and because the officers of the Respondent Company observed and knew that a majority of its employees in such unit had ceased work and were on a peaceful picket line patrolling the Company's premises. 42/ Thus unless the Respondent Company for some lawful reason was excused on October 12, 1965 from recognizing and bargaining with the Union as the statutory representative of its employees, it became so bound. "An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." N.L.R.B. v. Dalstrom Metallic Door Co., 112 F. 2d 756, 757 (C.A. 2). "Convincing evidence of majority support" was presented to the Respondent employer on October 12, 1965 when the Union offered for the employer's examination the valid union designations of a majority of its employees in an appropriate unit and when a majority of the employer's employees in such unit engaged in strike and appeared as a peaceful picket line at its premises. The voluntary walk out of a majority of the employer's employees and their peaceful picketing thereafter stand in the record as unrebutted notice of the Union's majority status and a confirmation of the authenticity and uncoerced character of the union designations. 43/ Nevertheless, although the Union reiterated its demand for bargaining by letters dated November 3, 1965, November 5, 1965, December 27, 1965 and January 6, 1966 and filed a refusal to bargain charge on December 4, 1965, the record discloses no

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39/ There is competent and credible testimony supporting a finding that all the Derses in passing to and from the Company's establishment had an opportunity to observe the picketing commencing on October 12, 1965 and the employees on the picket line.

40/ The record is barren of any competent credible evidence that on October 12th or 13th any of the 13 card signers were unlawfully coerced into signing the union authorization cards or joined the picket line because of unlawful coercion.

41/ If a good-faith doubt as to the appropriateness of the unit were claimed by the Respondent employer, such claim would not lie since a good-faith but erroneous doubt as to the appropriateness of the unit is not a defense to an otherwise meritorious charge of a refusal to bargain. Southland Paint Company, Inc., 156 NLRB No. 2, Owego Street Supermarkets, Inc., 159 NLRB No. 139.

42/ Derse testified that Cohen produced "probably fifteen" authorization cards (two were blank) at the October 12th demand. Derse reported to the officers on October 14, 1965 that 10 or 11 employees were on strike. The Respondent conceded that 11 employees walked out of the plant on October 12th. Employee Munoz credibly testified that while the 11 pickets were on the picket line on October 12th, the picket line was observed by at least one Derse. Hissam credibly testified that when the 11 employees ceased work and left the plant they all commenced peacefully picketing with signs reading "On Strike. Textile Workers Union of America" and that while the 11 were picketing all the Derses went "by."

43/ All of the union authorization card signers appeared on the picket line.

evidence that the employer advised the Union of the basis for its failure to respond to the Union's bargaining demand 44/ or that the employer sought to avail itself of the provisions of Section 9(c)(1)(B) of the Act. 45/ Under these circumstances, as was said in N.L.R.B. v. Preston Feed Corporation, 309 F. 2d 346, 351 (C.A. 4): ". . . it is a little short of absurd for an employer to express doubt as to representative status of a union when the majority of the employees had gone on strike under its guidance." When a doubt does not exist, a force, a defense of good-faith doubt is lacking in merit and is wholly superfluous. Indeed it is sheer fiction to indulge the defense of good-faith doubt where doubt cannot exist 46/ as in this case. Had the Respondent Company been inclined to accommodate the statutory purpose it either would have responded to the Union's request by putting to rest its purpose for ignoring the Union's demand 47/ or it would have availed itself of Section 9(c)(1)(B) of the Act. Having done neither, the Respondent Company depicted an absence of good faith and a disposition to avoid the Act's directives. Rather the employer strove to test its employees' economic ability to foist union recognition upon it even though it well knew that its employees had designated the Union as their statutory bargaining representative. Thus its chosen course of conduct was a cause of industrial conflict and ran counter to the purposes of the Act to eliminate the causes of industrial strife.

44/ On December 2, 1965 Union Representative Jack Rubenstein sent the following letter to the employer:

> "Because of my inability to arrange a conference for the purpose of receiving recognition and entering into collective bargaining with your company which represents the majority of your employees, proof of which has been presented to you, I have found it necessary, at this time, to bring charges against your company for refusal to recognize the union's majority position in the plant.
>
> Likewise I called the legal firm whose address you gave us, namely Friedlander, Gains & Ruttenberg, 221 W. 57 Street, and spoke to Mr. Ruttenberg. I was unable to get any positive commitment from him regarding our union's recognition or as to any positive statement as to your company's willingness to sit down and meet with the union.
>
> The company's failure to act in accordance with the provisions of the law which requires the company to recognize the union representing the majority of the company's employees leaves the union with no other recourse but to proceed with the charges as filed.

45/ Section 9(c)(1)(B) of the Act provides for the filing of a petition "by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;"

46/ A showing of doubt requires more than an employer's mere assertion of it and more than the proof of the employer's subjective state of mind. Doubt must be proved by objective considerations. Cf. Laystrom Manufacturing Co., 151 NLRB 1482, 1484. Objective facts in the instant case do not furnish a reasonable basis for any doubt.

47/ ". . . there must be some manifestation of doubt to the union." Skyline Homes, Inc. v. N.L.R.B., 323 F. 2d 642, 648 (C.A. 5).

The Respondent Company argues that its chosen course of conduct was not unlawful. The employer claims that it "has the statutory right to reject union authorization cards as proof of majority status and has the right to withhold recognition until the Union shall have been certified pursuant to an election conducted by the National Labor Relations Board." 48/ But "/t/here is no absolute right vested in an employer to demand an election." N.L.R.B. v. Trimfit of California, 211 F. 2d 206, 209 (C.A. 9); accord N.L.R.B. v. Nelson Mfg. Co., 326 F. 2d 397, 399 (C.A. 6). 49/ "The Act is clear in intent . . . that election and certification proceedings are not the only method of determining majority representation . . . ." Matter of L. B. Hartz Stores, 71 NLRB 148, 871; IOB v. Los Angeles Brewing Co., 183 F. 2d 398, 405 (C.A. 9).

Moreover, the argument of the Respondent Company overlooks the salient and distinguishing fact that in the instant case not only was the majority status proved by valid union authorization cards but the majority status was positively proved by the strike and peaceful picketing by a majority of the employees in an appropriate unit. Such a showing of majority support constituted a designation of the Union as the bargaining representative of the Respondent Company's employees within the meaning of Section 9(a) of the Act and was as legally binding upon the Respondent as if the Board had certified the results of an election conducted in conformity with Section 9(c) of the Act.

The Supreme Court has said in United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62, 71 " . . . Section 9(a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See Lebanon Steel Foundry v. Labor Board, 76 U.S. App. D.C. 100, 103, 130 F. 2d 404, 407." 50/ The statute "leaves open the manner of choosing" the bargaining representative. Id., 74.

When a choice of bargaining agent has been made which satisfies the requirements of Section 9(a) of the Act an employer may not test the economic strength of his employees by provoking or prolonging a recognition strike. There is no doubt that the Respondent employer could have lawfully recognized and bargained with the Union. "That being so, there is no reason

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48/ In N.L.R.B. v. Dahlstrom Metalic Door Co., supra, 757 the Court said, "The contention that bargaining was not mandatory until the Board had accredited Local No. 307 as bargaining agent is frivolous."

49/ In United Butchers Abattoir, Inc., 123 NLRB 947, 957, the Board said, "The right of an employer to insist upon a Board-directed election is not absolute." Stated another way the Board recently said in Metropolitan Life Insurance Company, 156 NLRB No. 113:

> A representative proceeding is not a prerequisite to the validity of a bargaining order.

50/ The following language appears on page 407:

> "The Wagner Act requires no specific form of authority to bargain collectively . . . . Authority may be given by action as well as words. . . . Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as employees' representative in collective bargaining. This intent has been found from participating in a strike vote taken by the union, a strike called by the union, and acceptance of strike benefits. It is only necessary that it be manifested in some manner capable of proof, whether by behavior or language . . . ."

why the employees, and their union under their authorization, may not under Section 13, strike, and, under Section 7, peacefully picket the premises of their employer to induce it thus to recognize their chosen representative." United Mine Workers of America v. Arkansas Oak Flooring Co., supra, 75. The strike and peaceful picketing on October 12, 1965 were lawful 51/ and the employees' choice of the Union by signed designations and the participation in strike and picket line activities satisfied the requirements of Section 9(a). Hence it must be conceded that the Union represented a majority of the Respondent Company's employees in an appropriate unit.

"Under /Sections 7 and 9(a)/ and by virtue of the conceded designations of the Union, the employer is obligated to recognize the designated union." United Mine Workers of America v. Arkansas Oak Flooring Co., supra, 75. Where, as here, the employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without a valid ground therefor, he has failed to fulfill the bargaining requirements under the Act. Snow and Sons, 134 NLRB 709, 710.

The Trial Examiner finds that by its refusal to recognize and bargain collectively with the Union on October 12, 1965 and thereafter the Respondent Company violated Sections 8(a)(1) and (5) of the Act and that the strike which resulted therefrom was caused and prolonged by said unfair labor practices and the strike was an unfair labor practice strike.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent Company set forth in Section III, above, occurring in connection with its operations set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

The Board has said:

> The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred and thereby effectuate the policies of the Act. Thus "depend/ing/ upon the circumstances of each case," the Board must "take measures designed to re-create the conditions and relationships that would have been had there been no unfair labor practice." H. W. Elson Bottling Co., 155 NLRB No. 63.

"To re-create the conditions and relationships that would have been had there been no unfair labor practice" in the instant case would mean literally that the status quo must be restored as of a date immediately preceding the time when the Respondent Company first determined to deny recogntion to the Union. At that time all strikers were gainfully employed. They were performing their usual job assignments. On that date had the Respondent Company assumed its obligation to bargain, it is reasonable to assume that the strikers would have remained at work and collective bargaining would have had a chance to succeed. However, by reason of the Respondent Company's unfair labor practices this chance for collective bargaining to succeed will occur after

51/ Where a meritorious Section 8(a)(5) charge is filed a Section 8(b)(7)(C) charge will not lie. See International Hod Carriers Building and Common Laborers Union of America, 135 NLRB 1153, 1166, fn. 24.

the Company by its unfair labor practices has reduced the Union's bargaining strength and dissipated the effect of its strike. Thus the re-creation of the identical conditions and relationships as they existed had the unfair labor practices not been committed appears to be impossible of achievement, but there is left the probability of depriving the Respondent Company in part of the advantages it has unlawfully gained, one of which has been the reduction of the Union's bargaining power to almost nothing. By its unfair labor practices the Respondent deprived its employees of the means of dealing with their employer with a measure of equality, discouraged collective bargaining, and rendered impotent their utilization of collective action. In this the Respondent flouted the purposes of the Act. ". . . the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power . . . ." N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 126.

A bare order to bargain in this case will only serve to acknowledge the formalities of the law while the Respondent retains full possession of the fruits of its violations. Cf. Montgomery Ward & Co. v. N.L.R.B., 339 F. 2d 889, 894 (C.A. 6). Moreover, it is the Respondent who should bear the brunt of the disentanglement of the consequences of its unfair labor practices, since it has caused the chain of events which resulted in the deprivation of rights flowing to the Union and its employees. An appropriate remedy contemplates that the employer shall not retain the fruits of his unfair labor practices. Beacon Piece Dying & Finishing Co., Inc., 121 NLRB 953, 963. See also N.L.R.B. v. Armco Drainage & Metal Products, Inc., 220 F. 2d 573 (C.A. 6); Piasecki Aircraft Corporation v. N.L.R.B., 280 F. 2d 575, 591 (C.A. 3) cert. denied 364 U.S. 933. A remedy which will "effectuate the policies" of the Act in this case calls for a restoration of the Union's bargaining power lost by reason of the Respondent Company's unfair labor practices.

Hence, in order that to some extent the bargaining power of the Union destroyed by the Respondent Company's labor practices may be restored, and, in order that the unfair labor practice strikers who lost pay by reason of the Respondent Company's unfair labor practices may be reimbursed, and, in order to effectuate the policies of the Act, the Trial Examiner recommends, in additon to a bargaining order and the posting of notices, that the Respondent make whole each unfair labor practice striker for loss of earnings 52/ he has suffered by paying to him a sum of money equivalent to the amount he would have normally earned during any periods commencing on October 12, 1965 when his usual job assignments were performed by another employee until such time as the Respondent Company has complied with the Recommended Order herein, less net earnings during said period, to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Co., 90 NLRB 289, and shall include interest at the rate of 6 percent per annum, to be computed in the manner set forth in Isis Plumbing & Heating Co., 138 NLRB 716.

52/ The Act does not specifically limit the Board's power to order backpay to any specific violation of the Act. Section 10(c) of the Act provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practices, then the Board . . . shall issue . . . on such person an order requiring such person . . . to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act.

As unfair labor practice strikers, the strikers in the instant case are entitled to reinstatement.

In that a purpose of the Recommended Remedy is "to remedy the individual worker's inequality of bargaining power" caused by the Respondent Company's unfair labor practices, it is further recommended that the Union be allowed to utilize the recommended backpay award as an item for negotiation.

Conclusions of Law

1. The Textile Workers Union of America, AFL-CIO is a labor organization within the meaning of the Act.

2. The Respondent Wilder Mfg. Co., Inc. is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. At all times since October 12, 1965, the above labor organization has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain with the Union on and after October 12 1965 said Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The strike which commenced on October 12 1965 was caused and prolonged by said Respondent's unfair labor practices and hence was an unfair labor practice strike.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that the Respondent Wilder Mfg. Co., Inc. its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with the Textile Workers Union of America, AFL-CIO in the following appropriate unit:

> All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and if an understanding is reached, reduce it to writing and sign it.

(b) Make whole each unfair labor practice striker for any loss of pay he may have suffered by reason of the said Respondent's unfair labor practices in accordance with the recommendations set forth in "The remedy" herein.

(c) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of backpay due and related rights provided under the terms of this Recommended Order.

(d) Post at its Port Jervis, New York establishment, copies of the notice attached hereto and marked "Appendix." 53/ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Second Region, in writing, within 20 days from the date of this Recommended Order, what steps said Respondent has taken to comply herewith. 54/

It is recommended that the complaint be dismissed insofar as it alleges violations of the Act other than these found in this Decision.

Dated at Washington, D. C.

Lowell Goerlich
Trial Examiner

53/ In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

54/ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

FORM NLRB-4632
(11-65)

APPENDIX

TXD-560-66

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the TEXTILE WORKERS UNION OF AMERICA, AFL-CIO as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL make whole each unfair labor practice striker for any loss of pay he may have suffered by reason of our unfair labor practices.

WILDER MFG. CO., INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Fifth Floor Squibb Building, 745 Fifth Avenue, New York, New York 10022 (Tel. No. 751-5500).

ARTHUR F. DERSE, SR., PRESIDENT AND WILDER MFG. CO., INC.

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

CASE NO. 2-CA-10823

GENERAL COUNSEL'S EXHIBIT NO. I

NATIONAL LABOR RELATIONS BOARD
Docket No. 2-CA-10823 OFFICIAL EXHIBIT NO. GC1
Disposition: Identified V; Received V; Rejected
In the matter of Derse
Date 6/7/66 Witness ——— Reporter
No. Pages

JA-28

Form NLRB-501 (9-65)

NLRB
American New York
4 NOV 9:40

Budget Bureau No. 64-R001.6

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with sections 9(f), (g), and (h) of the National Labor Relations Act.

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

Compliance Status Checked By:

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practices occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

NAME OF EMPLOYER: Arthur F. Derse, Sr., Pres. Wilder Mfg. Co., Inc.

NUMBER OF WORKERS EMPLOYED: 22

ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State): Mechanic St. & Erie RR Port Jervis, N. Y.

TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.): Factory

Identify principal product or service: Manufacture of Walking Plows, etc.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(b) subsections (1) and 8(a)5 (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The company, although it inspected the membership cards of the union which showed that the union represented a majority of the company's employees, has refused and continues to refuse to recognize the union as the collective bargaining agent.

Because of the company's refusal to recognize the union, the workers have been compelled to go out on strike.

Since the strike, the company has refused to meet with the representatives of the union and discuss the establishment of the collective bargaining agreement.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)

Textile Workers Union of America, AFL-CIO

4. Address (Street and number, city, zone, and State): 99 University Place, New York, N. Y. 10003

Telephone No.: OR 3-1[illegible]

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

Textile Workers Union of America, AFL-CIO

6. Address of National or International, if any (Street and number, city, zone, and State): 99 University Place, N.Y., N.Y. 10003

Telephone No.: OR 3-1[illegible]

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By [signature] (Signature of representative or person filing charge)

11/3/65 (Date)

New York State Director (Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION [illegible])

U. S. GOVERNMENT PRINTING OFFICE 16—57000-6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

ARTHUR F. DERSE SR. PRESIDENT AND
WILDER MFG. CO. INC.

and

CASE NO. 2-CA-10823

TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by Textile Workers Union of America, AFL-CIO, herein called the Union, that Wilder Mfg., Co., Inc., herein called Respondent Company, and Arthur F. Derse Sr., President, herein jointly referred to as Respondents, have engaged in, and are engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Second Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by the Union on November 4, 1965, and served by registered mail upon Respondents on or about November 6, 1965.

2. (a) Respondent Company is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent Company has maintained an office and place of business at Mechanic Street and Erie R.R., in the City of Port Jervis, State of New York, herein called the Port Jervis plant, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of baking pans, bakeshop equipment, and related products.

(c) During the past year, which period is representative of its annual operations generally, the Respondent Company, in the course and conduct of its business, purchased and caused to be transported and delivered to its Port Jervis plant, steel, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its plant in interstate commerce directly from states of the United States other than the state in which it is located.

(d) Respondent Company, is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. (a) Arthur Derse Sr., is and has been at all times material herein, the President of Respondent Company, acting on its behalf, and an agent thereof.

(b) Arthur Derse Sr., is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. William De Graw is, and has been at all times material herein, an agent of Respondent Company acting on its behalf, and a supervisor thereof within the meaning of Section 2(11) of the Act.

5. The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

6. All production and maintenance employees of Respondents, employed at its Port Jervis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. Commencing on or about October 9, 1965, the Union engaged in an organizational campaign among Respondents' employees in the unit described above in paragraph 6.

8. On or about October 11, 1965, a majority of Respondents' employees in the unit described above in paragraph 6, designated and selected the Union as their representative for the purposes of collective bargaining with Respondents and at all times since said date, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

9. On or about October 12, October 13, October 25 and November 5, 1965, the Union requested Respondents to recognize it and to bargain collectively with it as the exclusive collective bargaining representative of Respondents' employees in the unit described above in paragraph 6 with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of such employees.

10. (a) Since on or about October 12, 1965, Respondents' have refused to recognize or bargain collectively with the Union as the exclusive collective bargaining representative of Respondents' employees in the unit described above in paragraph 6.

(b) Respondents have refused to recognize and bargain collectively with the Union as described above in subparagraph (a) notwithstanding that they did not have a good faith doubt concerning the Union's majority status among the employees in the unit described above in paragraph 6.

11. (a) On or about October 12, 1965, the Respondents' employees ceased work concertedly, and went out on strike, and since said date, have continued to engage in such concerted work stoppage and strike.

(b) The strike described above in subparagraph (a) was caused, provoked and prolonged by the unfair labor practices of Respondents described above in paragraph 10.

12. On or about October 24, 1965, at the home of Jack Munoz, a striking employee, Respondents by William De Graw, urged and solicited him to join with other employees to select a committee of employees for the purpose of dealing directly with Respondents concerning employees' grievances, terms and conditions of employment.

13. By the acts described above in paragraphs 10 and 12, and by each of said acts, Respondents interfered with, restrained and coerced, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

14. By the act described above in paragraphs 10 and by each of said acts, Respondents refused to bargain collectively and are refusing to bargain collectively with the representative of their employees, and thereby engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

15. The acts of Respondents described above in paragraphs 10 and 12, occurring in connection with the operations of Respondent Company described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 4th day of April 1966, at 1:00 p.m., at 745 Fifth Avenue, Fifth Floor, in the City and State of New York, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall each file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an

answer to the said Complaint within ten (10) days from the service thereof, and that unless each does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board.

Dated at New York, New York this 31st day of January 1966.

Ivan C. McLeod, Regional Director
National Labor Relations Board
745 Fifth Avenue
New York, New York 10022

March 31, 1966

Re: Wilder Mfg. Company
Case No. 2-CA-10823

Joseph Rosenthal, Esq.
Friedlander, Gaines & Ruttenberg
221 West 57th Street
New York, New York 1893463

Daniel Jordan, Esq.
99 University Place
New York, New York 1893461

Dear Sirs:

Please be advised that at the hearing in the above-captioned matter Counsel for the General Counsel will move to amend the Complaint as follows:

Paragraph (9) shall read:

> On or about October 12, October 13, October 25, October 27, November 3, November 5, December 27, 1965 and January 6, 1966, the Union requested Respondents to recognize it and to bargain collectively with it as the exclusive collective bargaining representative of Respondents' employees in the unit described above in paragraph 6 with respect to rates of pay, hours of employment and other terms and conditions of employment of such employees.

The amendment, as you will note, adds additional times when the Union made requests. The Motion In Opposition and the Bill of Particulars filed this day refers to Paragraph 9 as it was originally and as it will be amended.

Sincerely,

Raymond Green

Raymond Green
Attorney

REGISTERED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

ARTHUR F. DERSE SR., PRESIDENT, AND
WILDER MFG. CO. INC.

and

CASE NO. 2-CA-10823

TEXTILE WORKERS UNION
OF AMERICA, AFL-CIO

AMENDED COMPLAINT AND NOTICE OF HEARING

It having been charged by Textile Workers Union of America, AFL-CIO, herein called the Union, that Wilder Mfg., Co., Inc., herein called Respondent Company, and Arthur F. Derse Sr., President, herein jointly referred to as Respondents, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Second Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations -- Series 8, as amended, Section 102.17 hereby issues this Amended Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by the Union on November 4, 1965, and served by registered mail upon Respondents on or about November 6, 1965.

2. (a) Respondent Company is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent Company has maintained an office and place of business at Mechanic Street and Erie R. R., in the City

of Port Jervis, State of New York, herein called the Port Jervis plant, where it is and has been at all times material herein, engaged in the manufacture, sale and distribution of baking pans, bakeshop equipment, and related products.

(c) During the past year, which period is representative of its annual operations generally, the Respondent Company, in the course and conduct of its business, purchased and caused to be transported and delivered to its Port Jervis plant, steel, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its plant in interstate commerce directly from states of the United States other than the state in which it is located.

(d) Respondent Company, is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. (a) Arthur Derse Sr., is and has been at all times material herein, the President of Respondent Company, acting on its behalf, and an agent thereof.

(b) Arthur Derse Sr., is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. William De Graw is, and has been at all times material herein, an agent of Respondent Company acting on its behalf, and a supervisor thereof within the meaning of Section 2(11) of the Act.

5. The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

6. All production and maintenance employees of Respondents, employed at its Port Jervis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. Commencing on or about October 9, 1965, the Union engaged in an organizational campaign among Respondents' employees in the unit described above in paragraph 6.

8. On or about October 11, 1965, a majority of Respondents' employees in the unit described above in paragraph 6, designated and selected the Union as their representative for the purposes of collective bargaining with Respondents and at all times since said date, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

9. On or about October 12, October 13, October 25, October 27, November 3, November 5, December 27, 1965 and January 6, 1966, the Union requested Respondents to recognize it and to bargain collectively with it as the exclusive collective bargaining representative of Respondents' employees in the unit described above in paragraph 6 with respect to wages, hours and other terms and conditions of employment of such employees.

10. (a) Since on or about October 12, 1965, Respondents have refused to recognize or bargain collectively with the Union as the exclusive collective bargaining representative of Respondents' employees in the unit described above in paragraph 6.

(b) Respondents have refused to recognize and bargain collectively with the Union as described above in subparagraph (a) notwithstanding that they did not have a good faith doubt concerning the Union's majority status among the employees in the unit described above in paragraph 6.

11. (a) On or about October 12, 1965, the Respondents' employees ceased work concertedly, and went out on strike, and since said date, have continued

to engage in such concerted work stoppage and strike.

(b) The strike described above in subparagraph (a) was caused, provoked and prolonged by the unfair labor practices of Respondents described above in paragraph 10.

12. On or about October 24, 1965, at the home of Jack Munoz, a striking employee, Respondents, by William De Graw, their supervisor and agent, urged and solicited employees to join with other employees to select a committee of employees for the purpose of dealing directly with Respondents concerning employees' grievances, terms and conditions of employment.

13. On or about November 5, 1965, Respondents by Walter Derse, their officer and agent, warned and directed the non-striking employees to refrain from associating with members of the Union, on public streets outside Respondents' premises during non-working hours, and to refrain from giving any assistance or support to the Union, and threatened the non-striking employees with discharge and other reprisals if they continued to associate with members of the Union and if they gave any assistance and support to it.

14. In or about February 1966, exact date presently unknown, at the home of William De Graw, Respondents, by William De Graw, their supervisor, offered and promised to the employees changes in overtime and vacation policies and other benefits and improvements in their working conditions and thereafter, at a time presently unknown, Respondents granted said benefits to employees to induce them to refrain from becoming or remaining members of the Union and to refrain from giving any assistance or support to it and to induce them to abandon their membership in and activity on its behalf and to induce them to abandon the strike described above in paragraph 11.

15. Respondents engaged in the conduct described above in paragraphs 12 through 14, in order to undermine the Union and to destroy its majority status among such employees.

16. By the acts described above in paragraphs 10, 12, 13, 14 and 15, and by each of said acts, Respondents interfered with, restrained and coerced, and is interfering, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

17. By the acts described above in paragraphs 10, 12, 13, 14 and 15, and by each of said acts, Respondents refused to bargain collectively and are refusing to bargain collectively with the representative of their employees and thereby engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

18. The acts of Respondents described above in paragraphs 10, 12, 13, 14 and 15, occurring in connection with the operations of Respondent Company described above in paragraph 2, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 7th day of June, 1966, at 1:00 p.m., at 6 Church Street, in the Hearing Room, in the City of Port Jervis and State of New York (as heretofore scheduled), a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Amended Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall each

file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Amended Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Amended Complaint shall be deemed to be admitted by it to be true and may be so found by the Board.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at New York, New York this 9th day of May, 1966.

Ivan C. McLeod, Regional Director
National Labor Relations Board
Second Region
745 Fifth Avenue
New York, New York 10022

(C CASES)

STATEMENT OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE CASES

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act, the Administrative Procedure Act, and the Board's Rules and Regulations. Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D. C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

GPO 905-209

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

- -X

ARTHUR F. DERSE SR., PRESIDENT, and
WILDER MFG. CO. INC.

CASE NO.
2-CA-10823

-and-

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

- -X

ANSWER TO AMENDED COMPLAINT
AND REQUEST FOR BILL OF PARTICULARS

PLEASE TAKE NOTICE, that the undersigned, on behalf of Respondent, ARTHUR F. DERSE SR. and WILDER MFG. CO. INC. hereby interpose the following answer to the amended complaint issued by the Regional Director on May 9th, 1966.

1. Respondent admits paragraphs "1", "2", "3(a)" and "5" of the amended complaint.

2. Respondents deny each and every allegation contained in paragraphs "3(b)", "4", "6", "7", "8", "9", "10(a)", "10 (b)", "11 (a)", "11(b)", "12", "13", "14", "15", "16, "17" and "18".

PLEASE TAKE FURTHER NOTICE, that you are hereby requested to serve upon the undersigned the following bill of particulars in connection with the amended complaint:

1. With regard to the allegations contained in paragraph 13 thereof, state the names of those employees alleged to have been

A. Warned and directed to "refrain from associating with members of the Union";

B. Warned and directed to "refrain from giving any assistance or support to the Union".

C. Threatened "with discharge and other reprisals if they continued to associate with members of the Union and if they gave any assistance and support to it."

2. With regard to the allegations contained in paragraph 14 of the amended complaint, state the names of employees alleged to have been offered and promised by William De Graw "changes in over-time and vacation policies and other benefits and improvements in their working conditions" and the names of employees alleged to have been granted said benefits.

DATED: New York, May 18th, 1966.

Yours, etc.

FRIEDLANDER, GAINES & RUTTENBERG
Attorneys for Respondent
221 West 57th Street
New York, New York

TO: IVAN C. McLEOD,
Regional Director
National Labor Relations Board
Second Region
745 Fifth Avenue
New York, New York 10022

DANIEL JORDAN, ESQ.
Textile Workers Union of America, AFL-CIO
99 University Place
New York, New York

10/11/65 JA-45 FEB 1 1966

Upon asking employer for recocnition, and upon his refusal there is a motion among the people present to go on strike.

motioned by mike molloy

Seconded by Jack munoz

and agreed upon by the following

Joseph Munoz
Charles S. Shaw
Harold D. Vandermark
Arthur J. O'Hara
Harmon B. [illegible]
James E. Stemper
Dominick [illegible]
James Eke
Jack Munoz
Frederick J. Hicks
Michael J. Molloy

NATIONAL LABOR RELATIONS BOARD
2-CA-10823
OFFICIAL EXHIBIT No. GC 5
Docket No.
Disposition: Identified ✓ Received ✓ Rejected
In the matter of Dura
Date 6/7/66 Witness Reporter
No. Pages

12345

Jack

This is motion made at my house on Oct 11, 1965 at Holder M/s & employee meeting

MR. GREEN: No.

TRIAL EXAMINER: If not, you are excused.

(Witness excused)

TRIAL EXAMINER: Mr. Rubinstein, I understand that it is your desire to testify at this moment so you may be excused from the proceedings.

I also note that you entered the appearance as a representative of the Charging Party. Will there be somebody available tomorrow down here?

MR. RUBINSTEIN: Yes, Mr. Sy Cohen, who is the Hudson area director -- Joint Board Director will be present tomorrow.

TRIAL EXAMINER: Is he present now?

MR. RUBINSTEIN: Yes.

TRIAL EXAMINER: I would like to have him enter his appearance at this time.

MR. COHEN: Sy Cohen, 602 Warren Street, Hudson, New York, representing Textile Workers Union, Hudson Valley Joint Board.

TRIAL EXAMINER: Very well.

JACK RUBINSTEIN

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: State your name.

THE WITNESS: My name is Jack Rubinstein.

TRIAL EXAMINER: And your address?

THE WITNESS: My address is 99 University Place, New York City.

TRIAL EXAMINER: You may proceed, Mr. Green.

DIRECT EXAMINATION

Q (By Mr. Green) By whom are you employed, Mr. Rubinstein?

A I am employed by the Textile Workers Union of America as its New York State director.

Q How long have you been employed in that capacity or by that union?

A About 30 years.

Q How long in that capacity? That specific capacity.

A Since 1940.

Q Are you familiar with the Wilder Manufacturing Company?

A Yes, I'm familiar with it.

Q When did you first become familiar with that company?

A In the early part of October, about the 8th or 9th I was made aware of the fact that there was an interest on the part of the workers for joining the union.

MR. ROSENTHAL: Objection, move that the witness's answer be stricken as hearsay.

TRIAL EXAMINER: No, I will let it stand.

Go ahead.

Q Do you know a man named Walter Derse?

A Can't say I know him, I've seen him, talked to him once

or tried to.

Q Describe what happened on that particular occasion. When did it happen?

A On or about October the 25th. I came up to Port Jervis for the purpose of trying to meet some of the principals of the company to see if we could do something to settle the strike. I was standing alongside of the gate where the strikers picket tent was set up, and I talked with Mr. Hissam and Mr. Cohen and I said, "Is anyone in the plant," and they told me, "No."

They said -- I was told that the management people were out for lunch.

Stood around a while, and then two or three people said, "There's Walter Derse coming now."

He drove through the gate, parked his car and at that time I said, "Let's go and see if we can talk to him."

Q By the way, can you pick out Walter Derse? Is he in this room?

A Yes, he's in this room right now.

Q Please point to him.

A This is the gentleman sitting over here to my left.

MR. GREEN: I would like the record to show that Mr. Rubinstein pointed to the man sitting next to counsel for the Respondent and identified him as Walter Derse.

Q Go ahead.

A I approached Mr. Walter Derse and Mr. Sy Cohen and Hissam were with me. All three of us approached him.

I stepped up to Mr. Derse, and I said, "My name is Jack Rubinstein, and I represent the Textile Workers Union of America, and I would like to talk to you."

A little fumbling took place, and I said, "How about inviting me into your office?"

Mr. Derse says, "I can't talk to you."

I said, "How about recognizing our union?"

He said, "No comment."

With that he stuck his hand in his pocket and pulled out a little slip of paper and said, "These are my attorneys. Talk to them."

I said, "How about my talking to you?"

He shrugged his shoulders and said, "No comment."

After that he continued moving on, and the only way I could get to talk to him would be by grabbing him, and I knew that would be impolite, so the conversation ended.

Q That was all that was said?

A What?

Q That was all that was said?

A That was basically all that was said that I can remember at this moment.

MR. GREEN: Would you mark this for identification as General Counsel Exhibit 6 for identification.

(Thereupon, the document above described was marked General Counsel's Exhibit 6 for identification.)

TRIAL EXAMINER: Did you contact the attorneys?

THE WITNESS: Tried to.

Q I show you General Counsel's 6 for identification. I ask you to identify it.

A Yes, this is a slip of paper that Mr. Derse gave me, but there is a little slip over it which I done some scribbling on the bottom, but this is the slip that was given me.

Q It was attached to a piece of paper?

A That's correct.

MR. GREEN: All right, I would like to introduce this as General Counsel Exhibit 6.

TRIAL EXAMINER: Did you state a definite date?

THE WITNESS: This day that I approached him that he handed me this, I think it was about the 25th of the month.

TRIAL EXAMINER: 25th of what month?

THE WITNESS: The strike took place. October, I believe it was.

TRIAL EXAMINER: Is this the demand you referred to in your complaint, paragraph 9?

MRS. MORIO: I'm sorry, Mr. Trial Examiner.

TRIAL EXAMINER: Is this the demand you referred to in your complaint as occurring on October 25th?

MRS. MORIO: That's right, Mr. Trial Examiner.

TRIAL EXAMINER: Do you have any objection?

MR. ROSENTHAL: No objection.

TRIAL EXAMINER: Very well, General Counsel 6 is admitted.

(The document heretofore marked General Counsel Exhibit 6 for identification was received in evidence.)

Q Did you contact these attorneys?

A A day or two later I called the office of Friedlander, Gaines and Ruttenberg and I asked for Mr. Ruttenberg, and I said to him, "I'd like to get together with you to see if we can't settle this strike --" correction. I first identified myself to the party that answered the call and told him I was the representative of the Textile Workers Union of America, gave him my name, told him I was talking to him about the strike that was in progress at Port Jervis, New York at the Wilder Manufacturing Company, and expressed a desire to sit down and talk over a settlement of this whole situation.

He told me he was very busy and what's more he had not received any instructions from his client, and under the circumstances he didn't see any point in meeting. In addition to that he told me the company was very busy. I believe he made reference to a campaign of the taxi workers that was taking place then in New York.

Q Did this person identify himself to you?

A I understood it to be Mr. Ruttenberg that I was talking to. I may have been mistaken, it may have been Mr. Rosenthal, I don't know.

Q Did you leave a number for him to call you?

A Yes, I left my number.

Q Did you ask him to call him back? Ask him to call you back.

A Yes, I didn't ask that way, I said, "If you learn anything please let me hear from you."

MR. ROSENTHAL: Can we have a few less leading questions? After all, you should not have to lead Mr. Rubinstein.

TRIAL EXAMINER: When a leading question is posed and you have an objection to it I would appreciate it if you state it at that time.

MR. ROSENTHAL: I anticipate another one.

Q When, if ever, did you have any further contact with any of the company attorneys?

A I think about sometime in November I again called. I then asked who was handling the Wilder case. I believe a Mr. Cohen answered the phone, and I again raised the question of the possibilities of getting down and sitting down and talking about a settlement, and he was very unresponsive. He said he didn't know what the company wanted to do, and I says, "When you find out let me know."

Q Did he mention anything else during that conversation?

MR. KORENTAL: No further questions.

TRIAL EXAMINER: You are excused.

(Witness excused)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Call your next witness.

MR. GREEN: Helmut Hernsdorf.

HELMUT HERNSDORF

a witness called by and on behalf of the General Counsel, being duly sworn, testified as follows:

TRIAL EXAMINER: Be seated, please.

Give your name.

THE WITNESS: Helmut Hernsdorf.

TRIAL EXAMINER: Your address?

THE WITNESS: 99 Meehanic Street, Port Jervis.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Hernsdorf, as of October 12, 1965 by whom were you employed? On October 12th by whom were you employed?

A Wilder Manufacturing.

TRIAL EXAMINER: Are you still employed there?

THE WITNESS: No.

TRIAL EXAMINER: Very well.

Q How long had you been employed by that company?

TRIAL EXAMINER: How long? An hour, ten minutes, two hours?

THE WITNESS: I would say "Yes."

TRIAL EXAMINER: How long?

THE WITNESS: A few days.

TRIAL EXAMINER: How long at any one time did you walk with them on any one day?

THE WITNESS: Oh, about an hour, about an hour.

TRIAL EXAMINER: Very well.

Go ahead, Mr. Green.

MR. GREEN: I have no further questions of this witness.

CROSS-EXAMINATION

Q (By Mr. Rosenthal) Mr. Hernsdorf, when did you first go over to the picket line, at what time on October 12th?

A Right after lunch time.

Q You continued to work until lunch; is that correct? You did not stop work at 10:30 that day, did you?

A No.

Q You worked until lunch?

A Yes.

Q When you went out at lunch time did you speak to anybody?

A Yes.

Q To whom did you speak?

whether I walked or didn't.

Q On the afternoon of the strike you say that you stood around and watched them but did not carry a picket sign, is that right?

A Yes.

Q Then you went hom?

A About 3:00 o'clock, something like that.

Q Did you come back the next day?

A Yes.

Q What time did you get to the plant the next day?

A In the morning, in the morning.

Q What time?

TRIAL EXAMINER: Did you go to work the next day?

THE WITNESS: No.

TRIAL EXAMINER: Did you go to work at any time thereafter? At Wilder.

THE WITNESS: After -- I guess after three months.

TRIAL EXAMINER: You did not go to work for three months?

THE WITNESS: No, after three months I was out then I went in for one and a half day.

TRIAL EXAMINER: When?

Q You say you were out for three months, you did not go to work.

A Yes.

Q Then you came back to work at one point, right, about three months later?

A Yes.

Q This was around Christmas time?

A After Christmas time, after Christmas time.

Q You went back to work and you stayed there a day and a half?

A Yes.

Q Why did you stop coming to work after that?

MR. GREEN: I object, he is asking for a subjective state of mind. Besides which three months after this man started picketing is totally irrelevant.

TRIAL EXAMINER: I think I will allow the answer to that question.

You may answer.

Q Why did you stop working after you came back? Did anyone say anything that caused you to leave?

A No, no, nobody said something to me.

Q Why did you come back a day and a half and then leave?

A I would say just a funny feeling, you know, most of the guys still out there.

Q Did they say anything to you when they saw you go in to work?

A No.

Q They did not say a word?

MR. GREEN: I was wondering if I could save some time if I raised General Counsel's arguments with respect to Jean Clark and the allegation contained in Paragraph 15, I wonder if you could bear with us for about five minutes.

MR. ROSENTHAL: Could we have all the witnesses testify today? You can make the arguments at any apprqriate time, but why dont we get thewitnesses over with.

TRIAL EXAMINER: That is a good suggestion, Mr. Rosenthal.

Let's get the witnesses out of here, and then if you have any arguments that you want to propose, we will consider it.

IRVING HUGHSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you be seated, and give us your full name and address.

THE WITNESS: Irving Hughson, 12 Second Street, Port Jervis.

TRIAL EXAMINER: Very well.

Off the record.

(Discussion off the record,)

HEARING OFFICER: On the record.

Go ahead, Mr. Green.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Hughson, as of October 12th by whom were you employed? As of October 12th, by whom were you employed?

A October 12th -- Wilder Manufacturing.

Q How long had you been employed there?

A Oh, about fourteen years.

Q In what capacity were you employed?

A Machine shop operator.

Q Mr. Hughson, did you sign a card for the Textile Workers Union of America?

A Yes, sir.

Q I show you General Counsel's Exhibit 4-I in evidence, ask you if this is your signature?

A Yes.

Q Is that date, October 12th, 1965 the day you signed it?

A Yes.

Q Where did you sign this card?

A By the picket line at Wilder Manufacturing.

Q After October 12th, didyou return to work?

A No, I didn't.

TRIAL EXAMINER: Have you ever returned to work?

THE WITNESS: Yes, I returned January 20th.

MR. GREEN: I have no further questions.

I offer General Counsel's Exhibit 4-I.

MR. ROSENTHAL: I have no further questions.

TRIAL EXAMINER: You are excused.

(Witness excused.)

TRIAL EXAMINER: We will have a one-minute recess.

(Short recess.)

TRIAL EXAMINER: On the record.

SY COHEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name.

THE WITNESS: Sy Cohen.

TRIAL EXAMINER: And your address?

THE WITNESS: 602 Warren Street, Hudson, New York.

DIRECT EXAMINATION

Q (By Mr. Green) Mr. Cohen, by whom are you employed?

A Textile Workers Union of America.

Q In what capacity?

A Representative.

Q How long have you been employed by that union?

A Twenty odd years.

Q Mr. Cohen, are you familiar with the Wilder Company?

A Yes.

Q Do you know Mr. Walter Derse?

A Yes.

Q Would you please tell us how you first met Walter Derse, the circumstances, what happened?

A On October 12th we went to the company plant and asked for Mr. Derse.

Q "We"?

A Myself and William Hissam.

After some waiting he arrived. We introduced ourselves to him.

TRIAL EXAMINER: Mr. Cohen, tell us what you said rather than what you did.

THE WITNESS: Well, I told him I was a representative of the Textile Workers Union and that a majority of his employees designated us as their bargaining unit, we would like to talk to them.

Q So what happened?

A We went into his office.

Q Excuse me, we have sort of been interrupted. Why don't you start from the beginning and give us what happened.

TRIAL EXAMINER: Mr. Cohen, before you resume your testimony, would you tell us who was present besides yourself?

THE WITNESS: Mr. Hissam was present with me.

TRIAL EXAMINER: Just you and Mr. Hissam?

THE WITNESS: Yes.

TRIAL EXAMINER: This is on what date?

THE WITNESS: October 12th.

TRIAL EXAMINER: Where did you first meet Mr. Derse?

THE WITNESS: At the company plant.

TRIAL EXAMINER: Was it in his office or some other place?

THE WITNESS: No, his office, in the lobby of his building, and then he took us into his office or escorted us into his office.

Q (By Mr Green) What did you say to him, what did he say to you? Start from the beginning.

A Well, I told him that we represented a majority of his employees and we'd like to work -- sit down and discuss the -- ask for recgonition. I presented to him signed cards, designation cards. There were eleven signed cards and two unsigned cards in the deck.

We discussed the matter for awhile. This conversation had basically stated that he could not take care of this by himself, he would have to discuss this with his brothers, and that one brother was out of town.

TRIAL EXAMINER: What did you do with the cards?

THE WITNESS: I presented it to him by laying it on the table.

Q What did he do?

A He picked it up and went through them.

TRIAL EXAMINER: At any time while he was going through the cards did he mention the name of any individual who appeared on the cards?

THE WITNESS: No, didn't mention the names, but he did notice the fact that there were two blank cards in the deck.

TRIAL EXAMINER: Did he take enough time in going through the cards to have observed the signers?

THE WITNESS: Oh, yes, by all means.

TRIAL EXAMINER: Go ahead.

THE WITNESS: We were in there twenty minutes to a half hour.

Q (By MrGreen) Where was these two blanks?

TRIAL EXAMINER: There was not an objection made to that question, but I would sustain it if one was made. I think the only pertinent evidence is what transpired in that room.

Q Go ahead.

A I told him we had the majority, we're asking for recognition for the production and maintenance employees. He questioned the two blank cards, and I told him they're in there because two people who were signified they were going to sign.

We hadn't been able to get their signatures as yet and that is how they happened to be there. Kept talking about

recognition, never raised the question of majority, never raised any question.

MR. ROSENTHAL: Objection, witness is testifying as to conclusions now.

TRIAL EXAMINER: Yes.

Just tell us what he said. We will be able to draw inferences from what was notdsaid.

THE WITNESS: He said he wouldhave to discuss this with his brothers and family, and I kept pushing the fact, "Well, why don't we discuss this now?" I even asked him if he had an important order would he have to wait before he does anything to take it up with his brothers and his family, and kept moving on that line, and I got the same answers, he'd have to take it up with his brothers and he kept moving on out.

We also asked him at the time if we could bring in a member, some members of the work force with us into the room, and he denied us that privilege, he said, no.

TRIAL EXAMINER: Was there anything said about when he might be in a position to give you a firm answer as to what the company's position was going to be?

THE WITNESS: No. I asked for that. I said, "Would you be able to then give me an answer tonight, would be be able to give me an answer tomorrow?" And he kept saying he does not know, and he would not give me a firm position.

fizzle out if they didn't.

But, in any event, your testimony is that the employees were on their way out before you called Mr. Derse to tell him the union was going to strike; is that correct?

THE WITNESS: No, we informed the workers what would happen. I called Mr. Derse and told him what our decision was.

Now, there could just as well have been that the workers didn't walk out.

MRS. MORIO: Mr. Trial Examiner, the witness testified that he told Walter Derse during the first meeting that it was possible for the employees to walk out. I don't remember his precise language.

TRIAL EXAMINER: I remember his testimony, and the witness is very capable of putting his thoughts into words.

THE WITNESS: Thank you, sometimes I wonder.

TRIAL EXAMINER: Very well, go ahead.

MR. GREEN: Where were we?

TRIAL EXAMINER: The second conversation.

Q (By Mr. Green) You had a second conversation with Walter Derse?

A I called him again, asked him if he heard anything from his brothers. I told him, "As a matter of form I am asking you for recognition once more. I have additional cards

that I expected yesterday, I have them today." And they are ready for his scrutinization or review or whatever may be, and he told me that he was not able to make any -- he had no answer for me at this time on this basis. I asked him if he made contacts with his brother. He said no, and talked about that. I also -- what else? I also told him that I surely wouldn't like to see this thing continue, I'd like an answer as quickly as possible as I'm going away for two or three days to a states convention and would like an answer before I go.

I also mentioned that I might be in the Port Jervis area, and he says, "Wonder if I should call him," and he says, "If you want to call, call, if you don't, don't." On that bhasis, and left me with the impression that it would be futile for me to call him, maybe when he was ready he would call me, and that was about the answer on that basis.

Q Did he ever call you?

A No, he has never called me.

TRIAL EXAMINER: Will you tell me, were there any comments made about the fact that there was a picket line out in front of the plant?

THE WITNESS: No.

TRIAL EXAMINER: Did you not mention that to him at all?

THE WITNESS: No.

(Short recess.)

TRIAL EXAMINER: On the record.

WALTER DERSE

resumed the stand and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Rosenthal) Mr. Derse, did you at any time from October 12th up until today advise or authorize Mr. William DeGraw to contact or talk to any of your employees regarding the strike on your behalf?

A Absolutely not.

Q Did you at any time direct him to ask Mr. Munoz to return to work?

A Absolutely not.

Q Did you at any time instruct him to talk to Mr. Vandermark about returning to work?

A No.

Q Did you authorize him to make any statement to Mr. Charles Shaw about returning to work?

A No.

Q Did --

TRIAL EXAMINER: Mr. Derse, did you give Mr. DeGraw or any of your other supervisors instructions as to how to react in the event employees inquired of them about coming back to work?

THE WITNESS: Only thing I said, "The door was open to

from time to time she goes into the plants. This is not related to production work, it is merely to pick up cards and primarily she performs administrative work in the accounting departments as opposed to the work that Mr. Derse testified to that Flannery and Forbes perform or Frank May, which has to do with production.

TRIAL EXAMINER: What do you contend should be part of the production and maintenance units?

MR. ROSENTAL: No, excluded as an office clerical, Somarelly excluded, and I want to clarify that because it was testified that she did perform some parts of her duties in the production area.

Q Mr. Derse, I would like to direct your attention to --

MR. GREEN: Are we finished with the unit parts?

MR. ROSENTHAL: Yes.

MR. GREEN: Could we have a recess?

TRIAL EXAMINER: We will have a five-minute recess .

(Short recess.)

TRIAL EXAMINER: On the record.

Q (By Mr Rosenthal) Mr. Derse, will you remind us again how many years you have been associated with the Wilder Manufacturing Company?

A Thirty-nine years and two monthes.

Q During that period of thirty-nine years,was this company ever under contracts with any union or labor organization?

A They never were.

Q During that period of time up until October 12th of 1965, had any labor organization or representative of a labor organization requested that the company recognize them?

A Never.

Q During that period of time do you -- to your knowledge, was any organizational campaign started by any union to solicit members among your employees?

A I couldn't tell you that.

Q To the best of your knowledge there has been none?

A Never.

Q Mr. Derse,I want to direct your attention to the morning of October 12th. What time did you arrive at the plant on that morning?

A Just about twenty-five minutes to ten.

Q What did -- when you arrived at the plant,do you know whether or not Aruthur Derse, Jr., Robert Derse or your father were present at the time?

A They were not.

Q None of those three werepresent?

A No.

Q Now, at some time during the morning of October 12th, did any of those three come to the plant?

A Yes, Robert andArthur Derse,Senior.

Q What time did they arrive at the plant?

A This I cannot tell you, I don't know.

Q Now, I am shortly going to ask you about a conversation you had with Mr.Cohen on that morning. Can you tell us whether or not Robert Derse and your father arrived before or after you had the conversation with Mr. Cohen?

A They arrived -- to my knowledge they arrived afterwards. They don't punch a clock, so I don'tcheck up to check on them.

Q Will you describe the events of the morning of October 12th, 1965 from the time that you arrived at the plant at approximately twenty-five toten, you say?

A Yes.

Q Tell us exactly what happened after that.

A I arrived at the plants at twenty-five minutes to ten. I went into the lobby and then into the office, and I was stopped by one of the girls,and she said to me, "Do you know a Mr. Cohen?"

And I said, "I know several Mr. Cohens. Did you ask him where he was from?"

She said, "He wouldn't tell me."

Well, I said, "Where is Mr.Cohen now?"

She said, "He is out,but he will be back."

I said, "All right, I'll go into my office and when he returns let me know,but please try and find out where he's from."

So about five minutes later, approximately five minutes later, she got ahold of me and said, "Mr. Cohen is outside, he has somebody with him."

Well, I said, "Did you find out what company is he with? "

She said, "He wouldn't tell me."

Then I said, "Well, I'll have to go out and find out what his mission is."

I went out into the lobby, and these twomen were there and I asked them --

TRIAL EXAMINER: Excuse me for interrupting you at the point,but which one of the employees brought the message to you?

THE WITNESS: That was Yvonne Flannery.

TRIAL EXAMINER: All right, go ahead.

THE WITNESS: I wentout and I asked what their mission was, where they were from, and Mr. Cohen introduced himself. He said he was Sy Cohen, and this was Mr. Hissum.

I said, "What is your mission?"

Well, he said, "We're from the Textile Workers Union. We have something of mutual interest."

I says, "What do you mean?"

Well, he says,"We represent a majority of your employees, and we want to know whether you will recognize us as their bargaining agent."

Well, our lobby is rather small and I invited them into my office. I have a small conference table, two and a half feet by four feet, and I sat at one end and invited Mr. Hissam to sit at the other end and Mr. Cohen sat to my left.

I asked him to explain further his mission, and the first thing he done was to shove some cards in front of me, which I did not then at at that time attempt to pick up nor did I touch them.

I asked him to repeat his mission, and he said, "We represent a majority ofyour employees, and we want to know whether you will recognize us as their bargaining agent."

I said,"M r. Cohen, this is a corporation. And I have absolutely no authority to answer that question."

He said, "In other words, you refuse?"

I said, "I didn't refuse. I said I did not have the authority to answer that quetion."

It would be necessary for me to bring the other principals of this company and pass the information to

them for a decision as tohow -- what they would do, but I cannot give them an answer.

He says, "You know,if you refuse, we'll file unfair labor practice charges."

I said, "There's nothing I could do about it. I have no authority."

Well,he said to me, "Don't you act in emergencies?"

I said, "This to me is not an emergency."

He kept onasking, and I kept saying, "I don't know."

He said, "When will you let me know?"

I said, "One brother is in Atlantic City and I don't expect he will be back until tomorrow," and knowing that we culd only get together Wednesday night I tuld him the earliest I could do it was on Thursday, I culd have an answer on Thursday.

He said, "I can't wait that long." He said, "I have to know. I will give you one hour. Would you rather have the men wait outside?"

I said, I cannot doanything about it, I cannot answer the question you ask me."

He says, "We have some cards." These cards he shoved in front. I didn't pick them up, I moved them aside, I saw some signed cards, I saw some blank cards, and Mr. Cohen said, "Yes, there are blanks in there." And he said to me, "Can I talk to the men outside?"

I said, "I have no authority to let you talk to these men outside. The policy of our company, again I have no authority to let you inside to talk to these men. Atytwelve o;clock they come out tolunch, and you can talk to the,m if you want outside, but I cannot permit you to do that. I have to get that authorization."

He said, "Can we call somebody in there?"

I said, "We have apolicy that theonly calls that are permitted to employees are emegency calls," I said, "Usually a child is sick and they want to get the father or if a boiler blew up or something like that, why, we will permit that to go through." I says, "The way that is done, you call up the operator. If it is an emergency she will give it toJack McCaslin who will pass it on to the proper employee."

I took the cards, shoved them back. He picked them up and with that they got up. They walked out. I judge this was approximately about ten o'clock or ten after tmn. We spent, I would judge, about twenty minutes, twenty-five minutes at the most.

At twenty-five minutes past ten a telephone call came through the board. According to our records it's a Mr. Cohen who called up --

Q Let me stop you there a moment.

How are you sure of the exact time of thephone call?

Did you keep a phone record?

A We keep a phone record of every call that comes in, and the girl -- I give you a copy of it.

Q On this telephone record, is there any indication of the time and the name of the person who calls?

A Yes.

Q Continue your testimony. You say at ten twenty-five a telephone call came in?

A It came in, and on a sheet you will note that this came in and went directly in and was answered by Jack Munoz. At ten twenty-six, one minute later, a call come through again from Mr. Cohen directed to me, he told me before he went out that in order to extend this he would have to talk to Jack Rubinstein and get permission from him to hold the strike --

MRS. MORIO: Excuse me, Mr. Trial Examiner, I'm not clear, did he say in the phone call or earlier?

THE WITNESS: No, he said earlier in my office that he would have to find out and call his superior, Mr. Rubinstein, to find out whether or not they could wait until we could give them a bona fide answer.

He called me at twenty-six minutes past ten, again on the entry there.

Immediately after they talked to Jack Munoz, and told me that their boss said they cold not wait, that they were

going to pullthe men out.

Now precisely at that same time the cards of the men that went out was punched at ten twenty-six.

MR.ROSENTHAL: At this point would the reporter mark for identification as Respondent's Exhibit 6 this document.

(Thereupon, document referred to was marked Respondent's Exhibit No. 6 for identification.)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

The parties have stipulated that the Respondent's Exhibit No. 6 is an authentic copy of Mr. Munoz's -- Jack Munoz, is it?

MR. ROSENTHAL: The time card for the weekending October 16th, there is an entry on here showing what time he punched in and what time he punched out on the second day of the work week which was Tuesday, October 12th.

TRIAL EXAMINER: That stipulation agreeable to the General Counsel?

MR. GREEN: Yes.

TRIAL EXAMINER: Yes, very well. It is accepted in evidence.

MR.ROSENTHAL: Let the record indicate that Mr. Munoz punched out at ten twenty-six.

TRIAL EXAMINER: Are you offering the exhibits?

MR. ROSENTHAL: Yes.

TRIAL EXAMINER: Is there any objection to the receipt of General -- of Respondent's Exhibit 6?

MR. GREEN: No.

TRIAL EXAMINER: If not, it is received in evidence.

(Document heretofre marked Respondent's Exhibit No. 6 for identification was received in evidence.)

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

The exhibit is the time card of Jack Munoz, is it not, Mr. Rosenthal?

MR. ROSENTHAL: Yes.

TRIAL EXAMINER: Very well.

Q (By Mr. Rosenthal) Tell us anything else you can remember about the telephone call that came from Mr. Cohen on the 10:26 on the morning of October 12th?

A Merely told me that he had contacted Mr. Rubinstein and Mr. Rubinstein had said that couldn't wait any longer and that they were pulling them out.

Q Did you say anything in reply?

A All I said was, "Nothing I could do about it."

Q Now, did you have any further conversation with Mr.

Cohen on October 12th?

A No further conversation with Mr. Cohen.

Q On October 12th?

A On October 12th.

Q Did you have a conversation with him on the following day,October 13th?

A Yes, he called up on the telephone.

Q That was the next time you spoke with him?

A That was the next time we spoke.

Q Let's go back to October 12th. At the time that the employees went out on strike, did you make any attempts to contact your brothers and your father?

A I was unable to contact one that was out of town.

Q That would be Arthur Derse, Junior?

A Arthur Derse,Junior.

Q Did you attempt tomake any attempts to cntact him?

A Only later I laid a note on his desk to callme if he got in at night or early in the morning,he should give me a call.

I put this on his desk. I didn't know whether he was coming back or not late at night or whether he would only be in the mornings, but I left a note anyway.

Q Did you subsequently speak with Arthur Derse, Junior, later in the day on October 12th?

A On October 12th late that night he called me and I told

him he had stopped at the plant late that night, and I told him what had happened, and he said that he saw something was wrong and I said that we would have to get together on Wednesday night, the four of us, and I would let them know just what had taken place.

Q On the 13th of October you received a telephone call from Mr. Cohen; is that correct?

A That's correct.

Q What did you -- what time did you receive the call?

A Eleven twenty-five.

Q What did Mr. Cohen tell you at that time and what did you say tohim?

A Well, Mr.Cohen asked me if we had made up our mind, and I said, "No, my brother had not as yet returned, that I couldn't talk to him, that we would get together that night and I could only answer him the next nights. That was the earliest I could tell him." That was the extent of the conversation.

He wanted me to again agree to recognition, and I said I just couldn't do it until a decision was made. We would get together that night.

Q Did Mr.Cohen say anything else to you during that conver sation?

A Nothing whatsoever.

Q Did Mr. Cohen tell you that the union had obtained two

more authorization cards on that day, the 13th?

A No, he did not.

Q At the time that the cards were shown to you on October 12th, did you have the opportunity to count them?

A I did not count them.

Q Did you have any idea or did you make an estimate as to how many cards there were?

A Oh, I would judge that there was, including the blanks, probably fifteen cards. That's the closest I could come to it.

Q Did you know how many blanks there were?

A I didn't know how many blanks because I didn't look all the way through them.

Q Now, at any time following October 12th, did Mr. Cohen, Mr. Rubinstein or Mr. Hissam or anybody else tell you that the union had obtained more authorization cards than had been shown to you on October 12th?

MRS. MORIO: Mr. Trial Examiner, counsel has been leading the witness. Within leeway it is all right.

MR. ROSENTHAL: I believe the question asked for a direct denial of an allegation made by General Counsel the witness is permitted. Mr. Cohen testified that he told him on the 13th that he got two more cards, and I am asking this witness for a denial of that. I think the question is permissible.

TRIAL EXAMINER: Overruled.

MR. ROSENTHAL: Will the reporter please read back the last question?

(Record mad)

MHE WITNESS: He never told me.

Q Did anybody from the union ever tell you?

A No.

Q Did any employee ever tell you?

A No.

Q Did Mr.Cohen or Mr. Hissam or any other union official offer to have you count or check their cards again?

A No.

Q On October 13th, on the evening of October 13th, rather, did you, in fact, have a meeting with your brothers and father regarding the union situation?

A Yes, we did.

Q Did you make any decision or did you come to any conclusion with regards towhether or not the union represented a majority of your employees?

MRS. MORIO: Mr. Trial Examiner, I object to the form of the question. Can I ask what happened at the meeting? He is asking what the final thing is.

TRIAL EXAMINER: Will you read the last question back, Mr. Reporter?

(Record read.)

TRIAL EXAMINER: I think the question is proper, and you may answer it yes or no. Did you come to a decision?

THE WITNESS: As to whether we came to any decision - -

TRIAL EXAMINER: Did you or did you not?

THE WITNESS: The only decision we came to was --

TRIALEXAMINER: Just answer yes or not.

THE WITNESS: Yes.

TRIAL EXAMINER: All right. You may explain your answer now, if you desire to.

THE WITNESS: We came toa decision that we doubted this majority.

MR.GREEN: I object, why doesnt he testify what was said at this meeting?

MR. ROSENTHAL: That is perfectly all right with me.

MRS.MORIO: Let him say what happened.

Q (By Mr. Rosenthal) Mr.Derse, will you relate the conversation that you had with your father and brothers concerning your decision that you doubted that the union had a majority? Tell us what was said at this meeting.

A Well, we discussed the - and we doubted very much that Mr . Cohen had said that they had a majority.

Q Will yu discuss the fact of how many employees -

MR. GREEN: I object,he is leading the witness.

TRIAL EXAMINER: Mr. Derse, so that we can get beyond

this hurdle, would you relate to us as nearly as you can remember a conversation of the individuals who were present at the meeting, and who said whatever that individual is supposed to have said.

Go ahead.

THE WITNESS: Well, in our discussion they said, "Well, how many fellows were out?"

Well, I said, "It looks to me like about ten or eleven, and we're thirty-four people. Dropping us four as officers we still have thirty."

Now, simple mathematics, eleven is not a majority of thirty, so we doubted it very, very much.

Q Were you including all your employees in that thirty?

A Yes, because the conversation that Mr. Cohen, what Mr. Cohen told me, was that they represented a majo rity of our employees.

Q Did Mr.Cohen in his original conversation with you on the12th or in the telephone conversation on the 13th tell you that they represented a majority of your production and maintenance employees?

A He never mentioned it. The word employees was the only thing the man used.

Q Did he at any time on the 12th or the 13th use the word "production and maintenance employees"?

A He never did.

Q Did you ever have any conversation with Mr.Hissam on either of these two days?

A We had a conversation. Mr. Hissam called up on the 13th about one o'clock, I think, one-thirty, am I right?

Q That's right, onethirty.

A He called up. This was pay day, and he asked what we were going to do about pay day, and we told him that the side door would be open, the men would be paid as they regularly are, and they could come in and the could get their pay.

Q Did Mr.Hissam use the word "production and maintenance employees"?

A Mr. Hissam never said anything other than whether they would be able to cälect their pay.

Q Getting back to the meeting you had with the executives of the company on the night of the 13th, what else was said at that meeting?

A We decided we would, under the circumstances, we would retain counsel and from there on we would have to act according tothis counsel. We adopted this majority. I had heard a late rumble of somepossible problems.

Q What do you mean by that?

A Well, a little bit of -- might I say --

MRS. MORIO: Objection, this is hearsay.

THE WITNESS: -- arm twisting.

MRS. MORIO: Objection, he is leading.

THE WITNESS: It could have been McCaslin, anybody who walked through that parking lot.

Q One of your supervisors told you that he heard this?

MRS. MORIO: Objection, this is very crucial matter. He has been allowed to give hearsay. Now counsel is testifying for him.

TRIAL EXAMINER: To the best of your recollection, who of your supervisors, or if it was someone else, told you an employee had been threatened if he did not sign a card?

THE WITNESS: I head heard this -

TRIAL EXAMINER: I am only referring to a time prior to the dates of your meeting, of curse. Anything you heard after that it would be immaterial

THE WITNESS: I can only say that it came from some source within the plant. I cannot pinpoint to a man at this time.

TRIAL EXAMINER: Very well.

Go ahead.

Q Let's go forward. When is the next time, after October 13th that you had any conversation with Mr. Cohen or Mr. Hissam or Mr. Rubinstein for that matter?

A October 25th.

Q Tell us about that conversation.

A I was out to lunch. I drove back in to the parking lot, and as I got out of the car I heard my name mentioned and I stopped, and Mr. Hissam, Mr. Cohen, Mr. Rubinstein walked over to the car, told -- called my name and I stppped.

Jack Rubinstein said, "I'm up in the area on some other matters, and I wonder if you made a decisinn."

I said, "I have no comment tomake."

I pulled a slip out of my pocket and handed it to him with the name of Friedlander, Gaines and Ruttenberg, with the phone number, and told him he should contact our attorney.

TRIAL EXAMINER: Do you remember when that took place?

THE WITNESS: Around the 25th of Octoker , around one-thirty.

Q Was there any other conversation between yourself and the union delegate?

A From that time on?

Q No, on October 25th.

A No, no.

Q Did they demand recognition again on that occasion?

A No,they asked whether I made up my mind.

Q They made no further clarification of what they meant?

A No, I just told them they have to cntact our attorneys.

Q Did you have a conversation with Frank Tonkinson

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UNITED STATES COURT OF APPEALS

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v.

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SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FRANK H. ITKIN,
MICHAEL F. ROSENBLUM,
Attorneys,
National Labor Relations Board.

Washington, D. C. THIEL PRESS - 202 - 363-6622

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SUPPLEMENTAL BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

On June 27, 1969, this Court granted the Board leave to supplement its initial brief filed herein in the light of the Supreme Court's recent decision in *N.L.R.B. v. Gissel Packing Co., Inc.*, ___U.S.___, 71 LRRM 2481 (Nos. 573, 691 and 585, June 16, 1969).

In this case, the Board, as shown in its initial brief (Bd. Br. 2), dismissed a complaint issued against Wilder Manufacturing Co., Inc. ("the Company") and its president, Arthur F. Derse, Sr., alleging that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations

Act by refusing to recognize the Union as the designated bargaining agent for its production and maintenance employees. The Board found (Bd. Br. 2-5):

* * *

> In the present case . . . there is no showing whatsoever that [the Company] had rejected the collective-bargaining principle or engaged in any interference, restraint or coercion of employees to undermine the union. Nor does the record show that [the Company] has engaged in any other conduct which would prevent the holding of a fair election. We conclude, therefore, that the record does not preponderantly establish [the Company's] bad faith in refusing to recognize the union, and we shall dismiss the complaint.

In *N.L.R.B. v. Gissel Packing Co., Inc., supra,* the Supreme Court sustained the Board's authority to issue a bargaining order where a majority of employees in an appropriate unit have designated a union as their representative,

> . . . [i]f the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by use of traditional remedies, though present, is slight, and that employee sentiment once expressed through [signed union authorization] cards would, on balance, be better protected by a bargaining order . . . [71 LRRM at 2495].

Although the Supreme Court deemed it unecessary to decide in *Gissel* "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (71 LRRM at 2488, 2490 n. 18), the Court, nevertheless, sustained those principles which the Board has applied in cases analagous to the one now on review and, as shown below, fully support the dismissal of the within complaint.

Thus, the Court restated the Board's "current practice" in cases involving authorization cards, as follows (71 LRRM at 2486, 2487-2488):

* * *

> When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election . . . . If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations.

* * *

Under this *rationale*, as the Supreme Court noted, "the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election." Consequently, "an employer can insist that a union go to an election, regardless of his subjective intent, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request and he can demand an election with a simple 'no comment' to the union." (71 LRRM at 2487-2488).

The Supreme Court expressly approved the Board's "current practice" as fully supported by "the policies reflected" in Section 9(c)(1)(B) of the Act; "for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election' ". In sum, as the Supreme Court explained (71 LRRM at 2491):

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards

> are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice.

The Court, however, emphasized in *Gissel* that it was not "faced with a situation where an employer, with 'good' or 'bad' subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to . . ." interfere with the holding of a free election[1] (71 LRRM at 2490, n. 18). For, as the Court noted, the Board has held that an employer "could not refuse to bargain" with a designated union "if he *knew*, through a personal poll for instance, that a majority of his employees supported the union . . ." (71 LRRM at 2488).[2] Nevertheless, the Board's refusal to determine that the instant case fits within the above exception is not,

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[1]The Court added (*ibid.*):

* * *

> We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute.

* * *

[2]See, for example, *N.L.R.B. v. George Groh & Sons*, 329 F.2d 265, 267 (C.A. 10, 1964) (where the employer—although stating to the union's representative that "he was satisfied [the union] represented [his] people"—declined recognition on the basis of a card showing); and *N.L.R.B. v. Sehon Stevenson & Co.*, 386 F.2d 551, 554 (C.A. 4, 1967) (where the employer's "own investigation . . . confirm[ed] the union's claim . . ."). *Compare, Snow & Sons v. N.L.R.B.*, 308 F.2d 687, 692 (C.A. 9, 1962) (where the employer at first "agreed to the check of cards against the payroll by a

under the facts presented (Bd. Br. 3-5), unreasonable. Here, one of the Company's officers was suddenly confronted with the Union's take-it-or-leave-it demand. He explained to the Union's representatives that he could not make the decision at that time. Minutes later, a majority of the Company's unit employees went on strike (Bd. Br. 3-5). This conduct did not *conclusively* establish that the employer, in refusing to recognize the Union, acted "without good reason . . ." (*supra*, p. 4). Indeed, on the prior evening when the employees signed authorization cards, they also signed an agreement "to go on strike" after "asking the employer for recognition and upon his refusal . . ." (Bd. Br. 4). The agreed-upon strike activity—like the closely related act of signing the cards—did not, under these circumstances, require the Board to find an unlawful refusal to bargain.

Accordingly, although the Supreme Court has left open the question of whether a bargaining order is "ever appropriate" in cases where there is no interference with the election process, the Board's refusal to enter such an order in this case is not unreasonable, and "[it] is for the Board and not the Courts to make that determination . . ." (71 LRRM at 2494 n. 32).

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mutual third party and subsequently rejected the results of such a check . . ." *Retail Clerks Union, Local No. 1179 (John P. Serpa, Inc.) v. N.L.R.B.*, 376 F.2d 186, 189-190 (C.A. 9, 1967)).

In *Gissel*, the Supreme Court observed that in "*John P. Serpa, Inc.*, 155 NLRB No. 12, 60 LRRM 1235 (1965) . . . the Board had limited *Snow & Sons* to its facts," and, "[u]nder the Board's current practice, an employer's good faith doubt is largely irrelevant . . .". (*ibid.*).

CONCLUSION

For the reasons stated herein and in the Board's initial brief, it is respectfully submitted that the petition to review should be denied.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
MICHAEL F. ROSENBLUM,
Attorneys,

National Labor Relations Board.

July 1969.

No. 22,596

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General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
MICHAEL F. ROSENBLUM,
Attorneys,

National Labor Relations Board.

Washington, D. C. - THIEL PRESS - 202 - 333-0825

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED*

The issue presented, as formulated by the parties in the pre-hearing conference stipulation, is set forth at p. 1 of petitioner's brief. In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case has not been before this Court previously.

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*This brief was filed with the Court in typewritten form prior to the issuance of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co., Inc.*, ___ U.S. ___, 71 LRRM 2481 (June 16, 1969). The parties hereto have filed a joint motion with the Court requesting permission to file supplemental briefs in the light of that decision.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of the Textile Workers Union of America, AFL-CIO ("the Union") to review an order of the National Labor Relations Board, issued on October 21, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), dismissing a complaint against Wilder Manufacturing Company, Inc. ("the Company") and its president, Arthur F. Derse, Sr. The Board's decision and order (A. 3-26)[1] are reported at 173 NLRB No. 30. This Court has jurisdiction of the proceedings under Section 10(f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

The unfair labor practice complaint issued herein alleged, *inter alia*, that the Company and its president had violated Section 8(a)(1) of the Act by interfering with, restraining and coercing employees "in order to undermine the Union and to destroy its majority status among such employees" (A. 38). The complaint further charged that the Company had violated Section 8(a)(5) and (1) of the Act by also refusing to recognize the Union as the designated bargaining agent for its production and maintenance employees (*ibid.*).

The Board affirmed the Trial Examiner's dismissal of the allegations of interference, restraint and coercion (A. 3, 8-10), and the Union, in its brief to the Court (Un. Br., p. 2), "accepts the dismissal . . . ." In addition, the Board found that "the record does not preponderantly establish [the Company's] bad faith in refusing to recognize the Union" and, therefore, dismissed the complaint in its entirety (A. 5-6). The uncontroverted evidence supporting this finding is summarized below.

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[1] "A." references are to the Appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

The Company is engaged in the manufacture, sale and distribution of bakeshop equipment and related products, and maintains a plant in Port Jervis, New York (A. 8). Its executive officers are Arthur F. Derse, Sr., president; Arthur Derse, Jr., vice president; Walter Derse, secretary and general manager; and Robert Derse, treasurer (A. 11). In addition, there were 30 employees on the Company's payroll as of October 12, 1965, 18 of whom were found to be engaged in production and maintenance work (A. 11, 16, 4).[2]

On the morning of October 12, 1965, Union representatives Cy Cohen and William Hissam met with Company representative Walter Derse at the plant. The three first spoke in the plant lobby, where Cohen informed Derse: "We're from the Textile Workers Union. We have something of material interest" (A. 16; 70-71). Derse asked "What do you mean," and Cohen answered that the Union represented a majority of the Company's production and maintenance employees; "we want to know whether you will recognize us as their bargaining agent" (A. 3, 16-17; 71).

Derse invited Cohen and Hissam into his office. There, Cohen placed 11 signed and 2 unsigned Union authorization cards in front of Derse (A. 17; 71). Derse "went through" the cards, commenting that some were unsigned.[3] Cohen then repeated his request for recognition, and Derse replied: ". . . this is a corporation and I have absolutely no authority to answer that question" (A. 3, 17; 71). Cohen stated, "In other words you refuse?", and Derse explained that he was not refusing but he simply did

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[2]The Trial Examiner found that an appropriate bargaining unit consisted of the Company's 18 production and maintenance employees (A. 16).

[3]Cohen stated that the unsigned cards were "in there because two people . . . signified they were going to sign," but the Union "hadn't been able to get their signatures as yet" (A. 17, n. 31; 62).

not have the authority to answer the question (A. 17; 71). To this, Cohen responded: "You know, if you refuse, we'll file unfair labor practice charges" (A. 17; 72). Derse again explained that he had no authority to answer the request; that one of his brothers, Arthur Jr., was in Atlantic City; and that a decision could not be made until he returned (A. 17; 72). Derse indicated, however, that the officers would be able to meet on the following evening. Cohen stated: "I can't wait that long. I have to know. I will give you one hour" (A. 3, 17; 72). At this point, Cohen asked if he could speak with the men and Derse replied that he could not allow Cohen to come into the plant. Cohen asked if he could telephone the employees and Derse replied that only emergency telephone calls were permitted (A. 17; 72-73). Cohen then picked up the authorization cards and left (A. 17; 73).

Minutes later, a telephone call was placed to one of the 11 employees who had signed a Union authorization card, and, immediately thereafter, all 11 employees left the plant and set up a picket line (A. 3, 17; 73-75).[4] At the same time, Cohen telephoned Derse to advise him that "their boss [Union Representative Rubenstein] said they could not wait . . ., that they were going to pull the men out" (A. 17; 76). Derse replied that there was "nothing [he] could do about it" (A. 17; 76).

The next day, October 13, Cohen again telephoned Derse, repeating his request for recognition.[5] Derse replied that he could not answer the

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[4]The 11 employees had signed authorization cards on the prior evening, October 11, at the home of representative Hissam. In addition, the employees had signed a document stating that they "agreed" to "go on strike" after "asking the employer for recognition, and upon his refusal . . ." (A. 10; 45).

[5]During this conversation, Cohen stated that he had obtained employee signatures on two additional authorization cards, which he did not have on the prior day (A. 17-18, n. 34; 64-65). The Trial Examiner found that employees Hernsdorf and

request until after he met with the other officers later that evening (A. 17-18; 78).

The Company's officers met during the evening of October 13 (A. 4, 18; 80). At the meeting, Walter Derse was asked how many of the employees were out on strike, and he answered about 10 or 11 (A. 82). Derse also stated that since there were 30 employees at the Company, not including the 4 officers, the Union could not possibly represent a majority (A. 4, 18; 82). A decision was then made not to extend recognition to the Union, and to retain labor counsel for future guidance (A. 4, 18; 83).

The picketing continued for about five months. On October 25, Union representative Rubenstein approached Walter Derse in the Company parking lot and asked him whether he had made a decision. Derse answered, "I have no comment to make" and handed Rubenstein a slip containing the name and telephone number of the Company's newly retained labor counsel. Derse told Rubenstein to contact the named attorneys (A. 4-5, 18; 84-85). Rubenstein called the attorneys on October 27; he was told, however, that the attorneys had received no instruction on the matter (A. 18, n. 37; 51). Thereafter, the Union reiterated its request for recognition, but the Company continued in its refusal to extend recognition (A. 5, 19-20).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board, in dismissing the complaint, stated as follows (A. 5):

* * *

> [T]o establish that an employer's failure or refusal to grant recognition to a union on the basis of [an authorization] card showing violates Section 8(a)(5), the General Counsel

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Hughson signed cards on October 12. Hernsdorf joined the picket line; and Hughson signed the card "[by] the picket line" and remained away from work (A. 10-11; 55-56, 58).

> has the burden of proving not only that a majority of employees in the appropriate unit designated the union as their bargaining representative, but also that the employer in bad faith declined to recognize and bargain with the union. This is usually based on evidence indicating that the employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the union and dissipate its majority [citations omitted].
>
> In the present case, however, there is no showing whatsoever that [the employer] had rejected the collective-bargaining principle or engaged in any interference, restraint or coercion of employees to undermine the union. Nor does the record show that [the employer] has engaged in any other conduct which would prevent the holding of a fair election.[6] We conclude, therefore, that the record does not preponderantly establish [the employer's] bad faith in refusing to recognize the union, and we shall dismiss the complaint.

ARGUMENT

THE BOARD PROPERLY DISMISSED THE COMPLAINT ALLEGING THAT THE COMPANY'S REFUSAL TO RECOGNIZE AND BARGAIN WITH THE UNION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

"The Act," as this Court stated in *Joy Silk Mills, Inc. v. N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F.2d 732, 741 (1950), cert. denied, 341 U.S. 914, "provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation." Nevertheless, the Court added,

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[6] The Trial Examiner, in dismissing the allegations of interference, restraint and coercion, found "that the employer's policy was clearly one of avoiding the commission of any unfair labor practices" (A. 9-10). The Union, in its brief, accepts this and all other findings made below (Un. Br., p. 2).

> it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by the union.

Consequently, when a union obtains authorization cards signed by a majority of employees in an appropriate unit designating the union as their bargaining agent, the employer's refusal to recognize and bargain with the union violates Section 8(a)(5) and (1) of the Act, if the refusal is not motivated by a good faith doubt as to the union's majority status. See, e.g., *International Union, A.,A.&A. Impl. Workers of America (Preston Products) v. N.L.R.B.*, 129 U.S. App. D.C. 196, 201-203, 392 F.2d 801, 806-808 (1968), cert. denied, *sub nom. Preston Products v. N.L.R.B.*, 392 U.S. 906; *Amalgamated Clothing Workers of America (Sagamore Shirt Co.) v. N.L.R.B.*, 124 U.S. App. D.C. 365, 373-381, 365 F.2d 898, 906-909 (1966); *Joy Silk Mills, Inc. v. N.L.R.B., supra.*[7]

Of course, the Board's secret-ballot election procedures will ordinarily provide a better means of testing majority status than a check of union authorization cards. Therefore, "[a]bsent an affirmative showing of bad faith, an employer presented with a majority card showing and a bargaining request will not be held to have violated his bargaining obligation . . . simply because he refuses to rely on cards, rather than an election, as the method for determining the union's majority . . ." *Aaron Brothers*, 158 NLRB 1077, 1078 (1966). And see, *Roanoke Public Warehouse*, 72 NLRB 1281, 1282 (1947); *Artcraft Hosiery Co.*, 78 NLRB 333, 334 (1948); *A. L. Gilbert Co.*, 110 NLRB 2067, 2069 (1954); *Caldwell Pack-*

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[7]*Contra: N.L.R.B. v. Gissel Packing Co., Inc.*, 398 F.2d 336 (C.A. 4, 1968), *N.L.R.B. v. Heck's Inc.*, 398 F.2d 337 (C.A. 4, 1968), *General Steel Products, Inc. v. N.L.R.B.*, 398 F.2d 339 (C.A. 4, 1968); cert. granted, 393 U.S. 997 (pending decision).

aging Co., 125 NLRB 495, 496 (1959); *Strydel, Inc.*, 156 NLRB 1185, 1187 (1966); *H & W Construction Co.*, 161 NLRB 852, 857 (1966); *Hercules Packing Corp.*, 163 NLRB No. 35, 64 LRRM 1331 (1967), affirmed, 386 F.2d 790 (C.A. 2, 1967); *J. Levine Textile, Inc.*, 173 NLRB No. 124, 69 LRRM 1440 (1968); *Morse Chain Co.*, 175 NLRB No. 98, 71 LRRM 1004 (1969). In short, to sustain a violation under the foregoing rationale, the General Counsel must carry "the burden of showing that the employer's refusal to bargain was in bad faith." *Drug King, Inc.*, 157 NLRB 343 (1966); *Aaron Brothers, supra; Hammond & Irving, Inc.*, 154 NLRB 1071 (1965).

Whether in a particular case an employer "is acting in good or bad faith, is . . . a question which of necessity must be determined in the light of all the relevant facts in the case." *Artcraft Hosiery Co., supra*, 78 NLRB at 334; *Joy Silk Mills, Inc., supra*, 87 U.S. App. D.C. at 369-370, 185 F.2d at 741-742. Thus, where a refusal to bargain is accompanied by such serious unfair labor practices that they dissipate the union's majority status or are likely to have that effect, it is reasonable to infer, as the Board has done with court approval, "that employer insistence on an election was not motivated by a good faith doubt of the union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union." *Aaron Brothers, supra*, 158 NLRB at 1079; *Joy Silk Mills, Inc. v. N.L.R.B., supra; International Union, A.,A.&A. Impl. Workers of America (Preston Products) v. N.L.R.B., supra; Amalgamated Clothing Workers of America (Sagamore Shirt Co.) v. N.L.R.B., supra.* Moreover, unfair labor practice conduct sufficient to dissipate a union's majority will also preclude the Board from conducting a fair election and, thus, undermine the very basis for a "good faith doubt" defense. See, *Int'l Union of Electrical, Radio, and Machine*

Workers, AFL-CIO (SNC Mfg. Co.) v. N.L.R.B., 122 U.S. App. D.C. 145, 352 F.2d 361 (1965), cert. denied, 382 U.S. 902; *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 210 (C.A. 9, 1954); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2, 1962), cert. denied, 370 U.S. 919.[8]

On the basis of the foregoing, the Board dismissed the unfair labor practice complaint issued in this case, concluding that the General Counsel had failed to sufficiently "establish [the employer's] bad faith in refusing to recognize the union . . ." (A. 5). As the Board found, "there is no showing whatsoever" that the Company, in refusing to extend recognition, "rejected the collective-bargaining principle"; "engaged in any interference, restraint or coercion of employees to undermine the Union"; or "engaged in any other conduct which would prevent the holding of a fair election" (A. 5). The Board's determination is both reasonable and proper.

[8]The Board, however, has made clear that not "any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding." *Aaron Brothers, supra,* 158 NLRB at 1079; *Hammond & Irving, supra,* 154 NLRB at 1073; *A. L. Gilbert Co., supra,* 110 NLRB at 2071 and nn. 3, 5. Such a determination requires an assessment "of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events and the time lapse between the refusal and the unlawful conduct." *Joy Silk Mills, supra.*

On the other hand, there have been some cases where an employer's refusal was found violative of Section 8(a)(5) even though he committed no independent unfair labor practices. See, e.g., *N.L.R.B. v. George Groh & Sons,* 329 F.2d 265, 267 (C.A. 10, 1964) (where the employer—although stating to the union's representative that "he was satisfied [the union] represented [his] people"—declined recognition on the basis of a card showing). Cases such as these, where an employer's other conduct shows a complete lack of doubt as to majority, are, of course, the exception. Cf., *Snow & Sons v. N.L.R.B.*, 308 F.2d 687, 692 (C.A. 9, 1962) (where the employer at first "agreed to the check of cards against the payroll by a mutual third party and subsequently rejected the results of such a check . . ." *Retail Clerks Union, Local No. 1179 (John P. Serpa, Inc.) v. N.L.R.B.*, 376 F.2d 186, 189-190 (C.A. 9, 1967)); and *N.L.R.B. v. Sehon Stevenson & Co.*, 386 F.2d 551, 554 (C.A. 4, 1967) (where the employer's "own investigation . . . confirm[ed] the union's claim . . .").

The Union argues (Br., pp. 11, 13, 22) that the Act "imposes upon employers an absolute duty to accord recognition . . ." when presented, as here, with a majority card showing in an appropriate bargaining unit.[9] However, as shown *supra*, pp. 7-9, an employer is able by-and-large to insist upon a secret ballot test of the union's majority status; his refusal to recognize the union before the election will not be found to have violated Section 8(a)(5) unless he engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election, or his other conduct indicates a lack of doubt as to the union's majority (see cases cited n. 8, *supra*). None of these factors are present here.

Indeed, the Board, in so administering Section 8(a)(5), is acting in full accord with the policy reflected in the Act. Thus, Congress enacted subparagraph (B) of Section 9(c) in 1947 to afford an employer a reliable means by which to determine whether a union claiming to represent his employees actually is the choice of a majority. The Senate Report declared that "present Board rules . . . discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess. 10-11, 1 Leg. Hist. (1947) 416-417. The remarks of Senator Taft during the debate are even more illuminating:

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[9]The Union, in stating this rule, would nonetheless limit its application to cases where the employer "is presented with reliable information . . ." (p. 11), "legally adequate proof . . ." (p. 12), "adequate proof . . ." (p. 13), "reliable demonstrations . . ." (p. 18), or "reliable evidence . . ." (p. 18) of majority status. The Union asserts that its card showing meets this standard and, *additionally*, the employees' picketing constitutes "a clear and notorious demonstration of their position" (p. 22).

* * *

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement or we strike tomorrow." . . . The employer has no way in which to determine whether this man really does represent his employees or not. The bill gives him the right to go to the Board and say, "I want to know who is the bargaining agent for my employees." [93 Cong. Rec. 3954, 2 Leg. Hist. (1947) 1013.]

See also the remarks of Senator Ball, 93 Cong. Rec. 5146, 2 Leg. Hist. (1947) 1496.[10] The Board, in refusing to hold that an employer is under "an absolute duty to accord recognition . . ." in such cases, is clearly not acting contrary to the policy of the Act.

The Union next asserts (p. 22) that its claim of majority status "need not rest on cards alone" because here "the employees who signed the cards . . ." commenced picketing. It is true, as the Board and courts have held, that picket line involvement of unit employees is relevant in assessing an employer's "bad faith doubt." See, e.g., *Smith Transfer Co.*, 100 NLRB 834, 836, n. 11 (1952), enforced, 204 F.2d 738 (C.A. 5, 1953); *N.L.R.B. v. Comfort, Inc.*, 365 F.2d 867, 876-877 (C.A. 8, 1966); *N.L.R.B. v. Preston Feed Corp.*, 309 F.2d 346, 350-351 (C.A. 4, 1962).

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[10]The Act also makes clear that certification carries with it special privileges not accorded unions which have been recognized voluntarily or pursuant to a bargaining order: e.g., protection for 12 months against the filing of new election petitions, either by rival unions or by employees seeking decertification (Section 9(c)(3)); protection for a reasonable period, usually one year, against any disruption of the bargaining relationship based upon claims that the union has lost its majority status; protection against recognitional picketing by rival unions (Section 8(b)(4)(C)); and freedom from the restrictions placed on work assignment disputes by Section 8(b)(4)(D), and on recognitional and organizational picketing by Section 8(b)(7). See *General Box Co.*, 82 NLRB 678, 682 (1949).

Nonetheless, as the above and related cases show,[11] the Board is not compelled to accept this evidence as dispositive of bad faith doubt.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FRANK H. ITKIN,
MICHAEL F. ROSENBLUM,
Attorneys,
National Labor Relations Board.

June 1969.

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[11] The Union, in its brief (p. 22) also cites *N.L.R.B. v. American Aggregate Co.*, 305 F.2d 559, 561 (C.A. 5, 1962) and *N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F.2d 91, 94 (C.A. 3, 1961). In *American Aggregate*, the court noted that an employer "may not with impunity stop all negotiations with a union that has been certified . . . merely because some doubt as to majority status has arisen." In *Barney's Supercenter*, the court regarded the employees' strike as "another factor" in establishing a "demand for recognition." Cf., *N.L.R.B. v. World Carpets*, 403 F.2d 408, 411 (C.A. 2, 1968), where the court noted the "alternative contention that any reasonable doubt respondent might have had was dissipated by the strike and the picketing . . ."